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## THE MASTER OF THE ROLLS,

THE

## VICE-CHANCELLORS,

AND THE

## CHIEF JUDGE IN BANKRUPTCY.

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## NAMES OF REPORTERS.

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[The sign — prefixed to the number indicating the line, signifies that it is reckoned from the bottom of the page.]

| *Page* | *Line* | | *For* | *Read* |
|---|---|---|---|---|
| 331 | — 1 | | partners | parties. |
| 334 | — 6 | | Defendant | Plaintiff. |
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# A TABLE

OF THE

# NAMES OF THE CASES REPORTED

IN THIS VOLUME.


A.

| | PAGE |
|---|---|
| Addison's Case. *In re* Brampton and Longtown Railway Company – – – – – | 620 |
| Allen *v.* Martin – – – | 462 |
| Amhurst, Fox *v.* – – – | 403 |
| Anglo-Danubian Steam Navigation and Colliery Company, *In re* – – – – – | 339 |
| Ashhurst *v.* Fowler – – | 225 |
| ——— *v.* Mason – – – | 225 |
| Ashton, *In re. Ex parte* Marland – – – – – | 777 |
| ——— *v.* Robinson – – | 25 |
| ———, Robinson *v.* – – | 25 |
| Ashworth, Fielden *v.* – – | 410 |
| Attorney-General *v.* Hackney Local Board – – – | 626 |
| ——— *v.* Webster | 483 |
| Australian Direct Steam Navigation Company, *In re* – – | 325 |

B.

| | |
|---|---|
| Baillie, *In re. Ex parte* Cooper | 762 |
| Baiss, Hackett *v.* – – – | 494 |
| Baker, Harnett *v.* – – – | 50 |
| ——— *v.* White – – – | 166 |
| Ball, *In re. Ex parte* Hicks – | 143 |
| Bangor and Portmadoc Slate and Slab Company, *In re* – | 59 |
| Basnett *v.* Moxon – – – | 182 |
| Batley *v.* Kynock – – – | 632 |
| Bedford (Duke of) *v.* Dawson – | 353 |
| Beer *v.* London and Paris Hotel Company – – – – | 412 |
| Berdan's Patent, *In re* – – | 346 |
| Beresford *v.* Browning – – | 564 |
| ———, Browning *v.* – – | 564 |
| Borrell, Tufnell *v.* – – – | 194 |
| Bothamley *v.* Sherson – – | 304 |
| Brampton and Longtown Railway Company, *In re.* Addison's Case – – – – | 620 |
| Brett, Jacobs *v.* – – – | 1 |
| Briggs *v.* Sharp – – – | 317 |
| Browne's Case. *In re* United Ports and General Insurance Company – – – – | 639 |
| Browning *v.* Beresford – – | 564 |
| ———, Beresford *v.* – – | 564 |

C.

| | |
|---|---|
| Cannon *v.* Trask – – – | 669 |
| Capel, Mills *v.* – – – | 692 |

PAGE

Carling's Case. *In re* Western of Canada Oil, Lands, and Works Company – – – 580
Carlyon *v.* Truscott – – 348
Chambers *v.* Green – – – 552
Chappell, Jones *v.* – – – 539
Charles Laffitte & Co., *In re.* Laffitte's Claim – – – 650
Chubb, Ewart *v.* – – – 454
Churchill *v.* Denny – – 534
Clutton, Lees *v.* – – – 20
Coal Economising Gas Company, *In re.* Gover's Case – – 114
Cochrane, *Ex parte.* *In re* Mead 282
Cogan *v.* Duffield – – – 789
Commins *v.* Scott – – – 11
Cooper, *Ex parte.* *In re* Baillie 762
Cordwell, White *v.* *In re* Cordwell's Estate – – – 644
Cordwell's Estate, *In re.* White *v.* Cordwell – – – 644
Coulton, Lees *v.* – – – 20
Coward and Adam's Purchase, *In re* – – – – – 179
Cross *v.* Maltby – – – 378
Crutwell, Marshal *v.* – – 328
Cull's Trusts, *In re* – – 561

D.

Dale, *In re.* *Ex parte* Mirabita 772
Dalzell, *In re.* *Ex parte* Rashleigh – – – – 782
David, Gibbs *v.* – – – 373
Dawson, Duke of Bedford *v.* – 353
Delves *v.* Delves – – – 77
Denny, Churchill *v.* – – 534
Dickin, *Ex parte.* *In re* Foster 767
Drinkwater *v.* Ratcliffe – – 528
Duffield, Cogan *v.* – – – 789

E.

Earle, Webb *v.* – – – 556
East London Railway Company, Fenwick *v.* – – – 544
Elworthy, *Ex parte.* *In re* Elworthy – – – – 742
Etherington *v.* Wilson – – 606
Ewart *v.* Chubb – – – 454

F.

PAGE

Fane *v.* Fane – – – – 698
Fenwick *v.* East London Railway Company – – – 544
Ferrige, *Ex parte.* *In re* Ferrige 289
Fielden *v.* Ashworth – – 410
Firmstone's Case. *In re* Malaga Lead Company – – – 524
Firth *v.* Midland Railway Company – – – – – 100
Flagstaff Silver Mining Company of Utah, *In re* – – – 268
Foster, *In re.* *Ex parte* Dickin 767
Fowler, Ashhurst *v.* – – 225
Fox *v.* Amhurst – – – 403
Fryer *v.* Salisbury and Dorset Junction Railway Company. *In re* Fryer's Settlement – 468
Fryer's Settlement, *In re.* Fryer *v.* Salisbury and Dorset Junction Railway Company – 468

G.

Gardiner, MacDougall *v.* – – 383
Gardiner's Estate, *In re.* Garratt *v.* Weeks – – – – 647
Garratt *v.* Weeks. *In re* Gardiner's Estate – – – 647
General Sewage Company, Nuneaton Local Board *v.* – – 127
Gibbs *v.* David – – – 373
Gillott, Taylor *v.* – – – 682
Globe New Patent Iron and Steel Company, *In re* – – 337
Glover, Salaman *v.* – – – 444
Gomersall, *In re.* *Ex parte* Gordon – – – – 291
Gordon, *Ex parte.* *In re* Gomersall – – – – – 291
Governors of Christ's Hospital, *Ex parte* – – – – 605
Governors of St. Bartholomew's Hospital, *In re* – – – 369
Gover's Case. *In re* Coal Economising Gas Company – – 114
Graham *v.* McCulloch – – 397
Gray, Waldy *v.* – – – 238
Great Eastern Railway Company, Harper and, *In re* – 39
Green, Chambers *v.* – – 552

H.

PAGE

Hackett *v.* Baiss – – – 494
Hackney Local Board, Attorney-General *v.* – – – – 626
Halstead United Charities, *In re* 48
Harloe *v.* Harloe – – – 471
Harnett *v.* Baker – – – 50
Harper and Great Eastern Railway Company, *In re* – – 39
Helliwell, *In re. Ex parte* Mackenzie – – – – 758
Heyl, Wainford *v.* – – – 321
Hickman *v.* Upsall – – – 136
Hicks, *Ex parte. In re* Ball – 143
Hill's Case. *In re* Maria Anna and Steinbank Coal and Coke Company – – – – 585
Hodgkin, *Ex parte. In re* Softley – – – – – 746
Holland, Yardley *v.* – – 428

I.

Iliffe, Smith *v.* – – – 666

J.

Jacobs *v.* Brett – – – 1
Jevers, Talbot *v.* – – – 255
Job *v.* Potton – – – 84
Johnson, *In re. Ex parte* Royle 780
Jones *v.* Chappell – – – 539

K.

Karuth's Case. *In re* Pelotas Coffee Company – – – 506
Kensington Station Act, *In re* – 197
King, *Ex parte. In re* Palethorpe – – – – 273
Knight and Raymond, *Ex parte.* Middleton *v.* Pollock – – 515
Kynock, Batley *v.* – – – 632

L.

Laffitte's Claim. *In re* Charles Laffitte & Co. – – – 650
Leader *v.* Moody – – – 145
Lees *v.* Clutton – – – 20
—— *v.* Coulton – – – 20
London and Paris Hotel Company, Beer *v.* – – – 412

M.

McCulloch, Graham *v.* – – 397
MacDougall *v.* Gardiner – – 383
Mackenzie, *Ex parte. In re* Helliwell – – – – 758
McKewan *v.* Sanderson – – 65
Macleay, *In re* – – – 186
Malaga Lead Company, *In re.* Firmstone's Case – – – 524
Malcolmson, Plympton *v.* – 37
Maltby, Cross *v.* – – – 378
Maria Anna and Steinbank Coal and Coke Company, *In re.* Hill's Case – – – – 585
———————, *In re.* Maxwell's Case – – 585
Marland, *Ex parte. In re* Ashton 777
Marshal *v.* Crutwell – – 328
Martin, Allen *v.* – – – 462
Mason, Ashhurst *v.* – – – 225
Maud, Merchant Banking Company *v.* – – – – 452
Maxwell's Case. *In re* Maria Anna and Steinbank Coal and Coke Company – – – 585
Mead, *In re. Ex parte* Cochrane 282
Merchant Banking Company *v.* Maud – – – – 452
Michell *v.* Wilton – – – 269
Middleton *v.* Pollock. *Ex parte* Knight and Raymond – – 515
——— *v.* Pollock *Ex parte* Nugee – – – – 29
Midland Railway Company, Firth *v.* – – – – 100
Mildmay *v.* Quicke – – – 537
Mills *v.* Capel – – – 692
Mirabita, *Ex parte. In re* Dale 772
Moody, Leader *v.* – – – 145
Morley, *In re* – – – 17
Morris' Settled Estates, *In re* – 470
Morton, *In re. Ex parte* Robertson – – – – – 733
Mott *v.* Shoolbred – – – 22
Moxon, Basnett *v.* – – – 182

N.

PAGE

Nash, Watkins *v.* – – – 262
Nugee, *Ex parte.* Middleton *v.* Pollock – – – – 29
Nuneaton Local Board *v.* General Sewage Company – – 127

O.

Olivant *v.* Wright – – – 220
Onslow's Trusts, *In re* – – 677
Orlebar's Settlement Trusts, *In re* 711

P.

Paddon *v.* Winch – – – 449
Palethorpe, *In re. Ex parte* King 273
Parkyns, Ross *v.* – – – 331
Pearce *v.* Watts – – – 492
Pelotas Coffee Company, *In re.* Karuth's Case – – – 506
Peters, Smith *v.* – – – 511
Plympton *v.* Malcolmson – – 37
Pollock, Middleton *v. Ex parte* Knight and Raymond – – 515
———, Middleton *v. Ex parte* Nugee – – – – 29
Potton, Job *v.* – – – 84

Q.

Quicke, Mildmay *v.* – – 537

R.

Rashleigh, *Ex parte. In re* Dalzell – – – – – 782
Ratcliffe, Drinkwater *v.* – – 528
Reader, *Ex parte. In re* Wrigley 763
Republic of Peru *v.* Weguelin – 140
———————, Weguelin *v.* – 140
Robertson, *Ex parte. In re* Morton – – – – 733
Robinson *v.* Ashton – – 25
———, Ashton *v.* – – 25
Rosher *v.* Williams – – 210
Ross *v.* Parkyns – – – 331
Royle, *Ex parte. In re* Johnson 780
Russell *v.* Wakefield Waterworks Company – – – – 474

S.

PAGE

Salaman *v.* Glover – – – 444
Salisbury and Dorset Junction Railway Company, Fryer *v. In re* Fryer's Settlement – 468
Salisbury (Marquis of), *In re* – 527
Sanderson, McKewan *v.* – – 65
Scott, Commins *v.* – – – 11
Sharp, Briggs *v.* – – – 317
Shepheard *v.* Walker – – 659
Sherson, Bothamley *v.* – – 304
Shoolbred, Mott *v.* – – – 22
Smith *v.* Iliffe – – – 666
——— *v.* Peters – – – 511
——— *v.* Smith – – – 500
Softley, *In re. Ex parte* Hodgkin 746
Staff, *Ex parte. In re* Staff – 775
Stevens, *Ex parte. In re* Stevens 786

T.

Talbot *v.* Jevers – – – 255
Taylor, *Ex parte.* Taylor *v.* Taylor – – – – 297
——— *v.* Gillott – – – 682
——— *v.* Taylor – – – 155
——— *v.* Taylor. *Ex parte* Taylor – – – – – 297
Thomson, Wilson *v.* – – 459
Thornton *v.* Thornton – – 599
Tinkler's Estate, *In re* – – 456
Trask, Cannon *v.* – – – 669
Truscott, Carlyon *v.* – – 348
Tufnell *v.* Borrell – – – 194

U.

United Ports and General Insurance Company, *In re.* Browne's Case – – – 639
Universal Disinfector Company, *In re* – – – – – 162
Upsall, Hickman *v.* – – 136

W.

Wainford *v.* Heyl – – – 321
Wakefield Waterworks Company, Russell *v.* – – – – 471
Waldy *v.* Gray – – – 2[illegible]

| | PAGE |
|---|---|
| Walker, Shepheard *v.* – – | 659 |
| Watkins *v.* Nash – – – | 262 |
| Watson *v.* Woodman – – | 721 |
| Watts, Pearce *v.* – – – | 492 |
| Webb *v.* Earle – – – | 556 |
| Webster, Attorney-General *v.* – | 483 |
| Weeks, Garratt *v.* *In re* Gardiner's Estate – – – | 647 |
| Weguelin *v.* Republic of Peru – | 140 |
| ———, Republic of Peru *v.* | 140 |
| Welsh Flannel and Tweed Company, *In re* – – – | 360 |
| Western of Canada Oil, Lands, and Works Company, *In re.* Carling's Case – – – | 580 |
| White, Baker *v.* – – – | 166 |
| ——— *v.* Cordwell. *In re* Cordwell's Estate – – – | 644 |
| Williams, *Ex parte.* *In re* Williams – – – – | 743 |
| ———, Rosher *v.* – – | 210 |
| Wills *v.* Wills – – – | 342 |
| Wilson, Etherington *v.* – – | 606 |
| ——— *v.* Thomson – – | 459 |
| Wilton, Michell *v.* – – – | 269 |
| Winch, Paddon *v.* – – – | 449 |
| Woodman, Watson *v.* – – | 721 |
| Wood's Settled Estates, *In re* – | 372 |
| Wright, Olivant *v.* – – – | 220 |
| Wrigley, *In re.* *Ex parte* Reader | 763 |

Y.

| | |
|---|---|
| Yardley *v.* Holland – – | 428 |

# TABLE OF CASES CITED.

## A.


| | | PAGE |
|---|---|---|
| Abercorn's (Marquis of) Case | 4 D. F. & J. 78 | 507 |
| Abrey *v.* Newman | 16 Beav. 431. | 344 |
| Alt *v.* Gregory | 8 D. M. & G. 221 | 343 |
| Ames *v.* Trustees of the Birkenhead Docks | 20 Beav. 332 | 285 |
| Anderson, Ex parte | Law Rep. 5 Ch. 473 | 285 |
| Appletreewick Lead Mining Company, In re | Law Rep. 18 Eq. 95 | 325 |
| Arnold's Trusts, In re | Law Rep. 10 Eq. 252 | 380 |
| Arrow *v.* Mellish | 1 De G. & Sm. 355 | 342 |
| Arthur *v.* Lamb | 2 Dr. & Sm. 428 | 91 |
| Askew's Case | Law Rep. 9 Ch. 664; 22 W. R. 762 | 118 |
| Atterbury *v.* Wallis | 8 D. M. & G. 454 | 246 |
| Attorney-General *v.* Bovill | 1 Ph. 762 | 613 |
| ——— *v.* Leeds Corporation | Law Rep. 5 Ch. 583 | 503, 628 |
| ——— *v.* Lord Hotham | T. & R. 209 | 488 |
| ——— *v.* Munro | 1 Mac. & G. 213 | 655 |
| ——— *v.* Parker | 3 Atk. 576 | 613 |
| ——— *v.* Vivian | 1 Russ. 226 | 488 |
| Attwater *v.* Attwater | 18 Beav. 330 | 187 |
| Atwool *v.* Merryweather | Law Rep. 5 Eq. 464, n. | 390, 477 |
| Aynsley *v.* Glover | Law Rep. 18 Eq. 544. | 497, 502 |


## B.


| | | |
|---|---|---|
| Badger *v.* Gregory | Law Rep. 8 Eq. 78 | 80 |
| Bailey *v.* Finch | Law Rep. 7 Q. B. 34 | 31 |
| ——— *v* Hobson | Law Rep. 5 Ch. 180 | 91 |
| Baines *v.* Baker | Amb. 158 | 131 |
| Baker *v.* Baker | 6 H. L. C. 616 | 270 |
| ——— *v.* Clark | Law Rep. 8 C. P. 121 | 4 |
| ——— *v.* Monk | 4 D. J. & S. 388 | 214 |
| ——— *v.* Parson | 42 L. J. (Ch.) 228 | 168 |
| Baldwin *v.* Rogers | 3 D. M. & G. 649 | 648 |
| Banner *v.* Johnston | Law Rep. 5 H. L. 157 | 641 |
| Barret *v.* Barret | Hetley, 35 | 541 |
| Barrow *v.* Barrow | 4 K. & J. 409 | 323 |
| ——— *v.* ——— | 18 Beav. 529 | 798 |
| Barrow's Case | Law Rep. 3 Ch. 784 | 362 |
| Bartlett *v.* Hudson | 14 Sol. J. 893 | 783 |
| Baynard *v.* Woolley | 20 Beav. 583 | 230 |
| Bayspoole *v.* Collins | Law Rep. 6 Ch. 228 | 214 |

| | | PAGE |
|---|---|---|
| Beasney's Trusts, In re | Law Rep. 7 Eq. 408 | 137 |
| Beaufort (Duke of) *v.* Neeld | 12 Cl. & F. 248 | 623 |
| Beck *v.* Kantorowicz | 3 K. & J. 230 | 118 |
| Bedford and Cambridge Railway Company *v.* Stanley | 2 J. & H. 746 | 492 |
| Beioley *v.* Carter | Law Rep. 4 Ch. 230 | 183 |
| Bell *v.* Midland Railway Company | 10 C. B. (N.S.) 287 | 23 |
| Beman *v.* Rufford | 1 Sim. (N.S.) 550 | 481 |
| Benham's Trusts, In re | Law Rep. 4 Eq. 416 | 138 |
| Benjamin *v.* Storr | Law Rep. 9 C. P. 400 | 23 |
| Bennett, Ex parte | 10 Ves. 381 | 79 |
| ——— *v.* Honeywood | Amb. 708 | 648 |
| Benson *v.* Chester | 8 T. R. 396 | 407 |
| Bermondsey, Vestry of, *v.* Brown | Law Rep. 1 Eq. 204 | 131 |
| Best's Settlement Trusts, In re | Law Rep. 18 Eq. 686 | 668 |
| Betts, Ex parte | 22 L. T. (N.S.) 245 | 284 |
| ——— *v.* Cleaver | Law Rep. 7 Ch. 513 | 654 |
| Biel's Estate, In re | Law Rep. 16 Eq. 577 | 472 |
| Bills *v.* Smith | 6 B & S. 314 | 751 |
| Birch *v.* Sherratt | Law Rep. 2 Ch. 644 | 270 |
| Bishop *v.* Church | 3 Atk. 691 | 34 |
| ——— *v.* ——— | 2 Ves. Sen. 100, 371 | 572 |
| Bishop of London, Ex parte | 2 D. F. & J. 14 | 371 |
| Blackburn v. Stables | 2 Ves. & B. 367 | 796 |
| Blackwell *v.* Bull | 1 Keen, 176 | 187 |
| Blagrave *v.* Blagrave | 4 Ex. 550 | 170 |
| Blair *v.* Bromley | 2 Ph. 354 | 728 |
| Boehm *v.* Wood | 2 Jac. & W. 236 | 375 |
| Bold Buccleuch, The | 7 Moo. P. C. 267 | 326 |
| Booth *v.* Vicars | 1 Coll. 6 | 411 |
| Botting, Ex parte | Law Rep. 19 Eq. 261 | 773 |
| Bottomley *v.* Brooke | Cited 1 T. R. 621 | 31 |
| Boulton *v.* Beard | 3 D. M. & G. 608 | 718 |
| Boursot *v.* Savage | Law Rep. 2 Eq. 134 | 247 |
| Bousfield *v.* Lawford | 1 D. J. & S. 459 | 32 |
| Boyd *v.* Boyd | Law Rep. 4 Eq. 305 | 157 |
| Bradford (Earl of) *v.* Earl of Romney | 30 Beav. 431 | 797 |
| Brampton and Longtown Railway Company, In re | Law Rep. 10 Eq. 613 | 200 |
| Brewster and West, Assignees of, In re | 22 L. J. (Bkcy.) 62 | 399 |
| Bridport Old Brewery Company, In re | Law Rep. 2 Ch. 191 | 363 |
| Bristow *v.* Miller | 11 Ir. Law Rep. 461 | 731 |
| Brocas *v.* Lloyd | 23 Beav. 129 | 634 |
| Brooke, Re | 30 Beav. 233 | 470 |
| Brown, Ex parte | Law Rep. 9 Ch. 304 | 765 |
| Brown's Case | Law Rep. 9 Ch. 102 | 508 |
| Bryant, Ex parte | 1 V. & B. 211 | 679 |
| Brydges *v.* Duchess of Chandos | 2 Ves. 417 | 434 |
| Buckle *v.* Mitchell | 18 Ves. 100 | 213 |
| Buckley *v.* Barber | 6 Ex. 182 | 570 |
| Bull *v.* Pritchard | 5 Hare, 567 | 719 |
| Bullen *v.* Sharp | Law Rep. 1 C. P. 86 | 335 |
| Burdick *v.* Garrick | Law Rep. 5 Ch. 233 | 727 |
| Burnham *v.* Bennett | 2 Coll. 254 | 798 |
| Burroughs *v.* M'Creight | 1 J. & Lat. 290 | 434 |
| Bush *v.* Trowbridge Waterworks Company | Law Rep. 10 Ch. 459 | 494 |
| Bush's Case | Law Rep. 9 Ch. 554 | 525 |
| Butcher, Ex parte | Law Rep. 9 Ch. 595 | 751 |
| Bythesea *v.* Bythesea | 23 L. J. (Ch.) 1004 | 715 |

## C.


| | | PAGE |
|---|---|---|
| Calder *v.* Dobell | Law Rep. 6 C. P. 486 | 15 |
| Campbell *v.* Maund | 5 A. & E. 865 | 391 |
| Cann *v.* Cann | 1 P. Wms. 723 | 708 |
| Carden *v.* General Cemetery Company | 5 Bing. N. C. 253 | 199 |
| Carr *v.* Lambert | Law Rep. 1 Ex. 168 | 408 |
| —— *v.* Living | 28 Beav. 644 | 319 |
| Carter *v.* Cropley | 8 D. M. & G. 680 | 614 |
| —— *v.* Taggart | 5 De G. & Sm. 49; 1 D. M. & G. 286 | 668 |
| Cartmell's Case | Law Rep. 9 Ch. 691 | 417 |
| Casborne *v.* Scarfe | 1 Atk. 603; 2 Jac. & W. 294 | 434 |
| Catholic Publishing and Bookselling Company, In re | 2 D. J. & S. 116 | 338 |
| Chapman *v.* Brown | 15 W. R. 474 | 641 |
| —— *v.* Derby | 2 Vern. 117 | 34 |
| Charitable Corporation *v.* Sutton | 2 Atk. 400 | 231 |
| Charles Laffitte & Co., In re | Law Rep. 10 Ch. 316 | 642 |
| Charlton *v.* Hay | 31 L. T. (N.S.) 437 | 117 |
| Christ Church, Ex parte | 9 W. R. 474 | 371 |
| Church *v.* Edwards | 2 Bro. C. C. 180 | 195 |
| Churchill *v.* Marks | 1 Coll. 441 | 187 |
| City Discount Company *v.* McLean | Law Rep. 9 C. P. 692 | 727 |
| City of London Brewery Company *v.* Tennant | Law Rep. 9 Ch. 212 | 496, 502 |
| Clark *v.* Cort | Cr. & Ph. 154 | 31 |
| —— *v.* Gill | 1 K. & J. 19 | 634 |
| —— *v.* Malpas | 4 D. F. & J. 401 | 214 |
| —— *v.* School Board for London | Law Rep. 9 Ch. 120 | 355 |
| Clarke *v.* Bickers | 14 Sim. 639 | 570 |
| —— *v.* Clark | Law Rep. 1 Ch. 16 | 496 |
| —— *v.* Mackintosh | 4 Giff. 134 | 512 |
| —— *v.* Moore | 1 J. & Lat. 723 | 662 |
| Clayton's Case | 1 Mer. 608 | 727 |
| Clegg *v.* Clegg | 3 Giff. 322 | 89 |
| Clinch *v.* Financial Corporation | Law Rep. 5 Eq. 450 | 390 |
| Clive *v.* Carew | 1 J. & H. 199 | 323 |
| Clowes *v.* Staffordshire Potteries Waterworks Company | Law Rep. 8 Ch. 125 | 23 |
| Clunes, Ex parte | 1 Madd. 76 | 686 |
| Coates *v.* Nottingham Waterworks Company | 30 Beav. 86 | 559 |
| Cochrane *v.* Green | 9 C. B. (N.S.) 448; 30 L. J. (C.P.) 97 | 31 |
| Cohen, Ex parte | Law Rep. 7 Ch. 20 | 750, 787 |
| Collen *v.* Gardner | 21 Beav. 540 | 623 |
| Collison *v.* Girling | 4 My. & Cr. 63 | 307 |
| Commins *v.* Scott | Law Rep. 20 Eq. 11 | 418 |
| Commissioners of Charitable Donations *v.* Wybrants | 2 J. & Lat. 182 | 434 |
| Compton *v.* Richards | 1 Price, 27 | 446 |
| Const *v.* Harris | T. & R. 496 | 390 |
| Cook *v.* Gill | Law Rep. 8 C. P. 107 | 9, 554 |
| Cookney *v.* Anderson | 1 D. J. & S. 365 | 736 |
| Cook's Settled Estates, In re | Law Rep. 12 Eq. 12 | 469 |
| Cooper, Ex parte | 1 M. D. & D. 358 | 400 |
| —— *v.* Phibbs | Law Rep. 2 H. L. 149 | 704 |
| Cork and Youghal Railway Company, In re | Law Rep. 4 Ch. 748 | 62 |

| | | PAGE |
|---|---|---|
| Cornell *v.* Hay | Law Rep. 8 C. P. 328 | 119 |
| Corry *v.* Londonderry and Enniskillen Railway Company | 29 Beav. 263 | 559 |
| Courtenay *v.* Williams | 3 Hare, 530; 15 L. J. (Ch.) 204 | 646 |
| Cousens *v.* Cousens | Law Rep. 7 Ch. 48 | 654 |
| Cowx *v.* Foster | 1 J. & H. 30 | 602 |
| Cox *v.* Hickman | 8 H. L. C. 268 | 335 |
| Crawford *v.* North Eastern Railway Company | 3 K. & J. 723 | 559 |
| Crofton *v.* Ormsby | 2 Sch. & Lef. 583 | 663 |
| Crosbie *v.* M'Doual | 13 Ves. 148 | 215 |
| Cuningham *v.* Antrobus | 16 Sim. 436 | 798 |
| Curriers' Company *v.* Corbett | 2 Dr. & Sm. 355; 11 Jur. (N.S.) 719 | 502 |
| Currie's Case | 3 D. J. & S. 367; 32 L. J. (Ch.) 421 | 508 |
| Cursham *v.* Newland | 2 Bing. N. C. 64 | 169 |


## D.


| | | |
|---|---|---|
| Da Costa *v.* Keir | 3 Russ. 360 | 223 |
| Daniel *v.* Ubley | Sir W. Jones, 137; Latch. 9 | 190 |
| Darbey *v.* Whitaker | 4 Drew. 134 | 108, 512 |
| Darcy *v.* Ashworth | Hob. 234 | 541 |
| Darnley (Earl of) *v.* London, Chatham, and Dover Railway Company | Law Rep. 2 H. L. 43 | 109 |
| Davis *v.* Duke of Marlborough | 2 Sw. 108 | 283 |
| —— *v.* Park | 42 L. J. (Ch.) 204 | 736 |
| De Haber *v.* Queen of Portugal | 17 Q. B. 171; 20 L. J. (Q. B.) 488 | 3 |
| Dering *v.* Lord Winchelsea | 1 Wh. & T. L. C. 4th Ed. p. 100 | 232 |
| Devaynes *v.* Noble | 2 Russ. & My. 495 | 570 |
| —— *v.* ——, Sleech's Case | 1 Mer. 539 | 573 |
| Dinham *v.* Bradford | Law Rep. 5 Ch. 519 | 110 |
| Dobson, Ex parte | 1 Mont. & A. 666 | 736 |
| Doe *v.* Barthrop | 5 Taunt. 382 | 177 |
| —— *v.* Biggs | 2 Taunt. 109 | 168 |
| —— *v.* Earl of Burlington | 5 B. & Ad. 507 | 541 |
| —— *v.* Nepean | 5 B. & Ad. 86; 2 M. & W. 894 | 138 |
| —— *v.* Nicholls | 1 B. & C. 336 | 170 |
| —— *v.* Pearson | 6 East, 173 | 190 |
| —— *v.* Willan | 2 B. & A. 84 | 174 |
| —— *v.* Winchester | 15 L. T. (O.S.) 68 | 168 |
| Douglas *v.* Douglas | Kay, 400 | 307 |
| —— *v.* Forest | 4 Bing. 686 | 201 |
| Dowling *v.* Dowling | Law Rep. 1 Ch. 612 | 380 |
| Dudgeon *v.* Thomson | 22 W. R. 464 | 38 |
| Dummer *v.* Pitcher | 5 Sim. 35; 2 My. & K. 262 | 310, 329 |
| Durell *v.* Pritchard | Law Rep. 1 Ch. 244 | 496, 687 |
| Durrant *v.* Friend | 5 De G. & Sm. 347 | 307 |


## E.


| | | |
|---|---|---|
| Eads *v.* Williams | 4 D. M. & G. 674 | 663 |
| Earle *v.* Bellingham | 24 Beav. 445 | 271 |
| Eastham *v.* Wilkinson | 33 L. T. 234 | 248 |

| | | PAGE |
|---|---|---|
| Edenborough *v.* Archbishop of Canterbury | 2 Russ. 93 | 489 |
| Edwards *v.* Coombe | Law Rep. 7 C. P. 519 | 773 |
| ——— *v.* Edwards | 15 Beav. 357 | 222 |
| ——— *v.* Freeman | 2 P. Wms. 436 | 157 |
| Elt *v.* Burial Board of St. Mary, Islington | Kay, 449 | 391 |
| Elworthy, Ex parte | Law Rep. 20 Eq. 742 | 776 |
| Emanuel *v.* Bridger | Law Rep. 9 Q. B. 286 | 751 |
| Erskine *v.* Adeane | Law Rep. 8 Ch. 756 | 446 |
| European Bank, In re | Law Rep. 5 Ch. 358 | 248 |
| Exeter and Crediton Railway Company *v.* Buller | 5 Railw. Cas. 211 | 390 |
| Eyre *v.* Marsden | 2 Keen, 564 | 257 |


## F.


| | | |
|---|---|---|
| Ferguson *v.* Wilson | Law Rep. 2 Ch. 77 | 477 |
| Ferrier *v.* Jay | Law Rep. 10 Eq. 550 | 602 |
| Festing *v.* Allen | 5 Hare, 573 | 720 |
| Fielding *v.* Preston | 1 De G. & J. 438 | 308 |
| Fisher, Ex parte | Law Rep. 7 Ch. 636 | 750 |
| Fletcher, Ex parte | 1 D. & Ch. 356 | 686 |
| Foley *v.* Hill | 2 H. L. C. 28 | 728 |
| Fontaine *v.* Tyler | 9 Price, 94 | 306 |
| Forbes' Case | Law Rep. 19 Eq. 353; 8 Ch. 768 | 508 |
| Forbes *v.* Peacock | 1 Ph. 717 | 349 |
| Forster, In re | 4 B. & S. 187 | 554 |
| Foss *v.* Harbottle | 2 Hare, 461 | 389, 477 |
| Foster *v.* Smith | 1 Ph. 629 | 271 |
| Fowkes *v.* Pascoe | Law Rep. 10 Ch. 343 | 329 |
| Foxley, Ex parte | Law Rep. 3 Ch. 515 | 788 |
| Fraser *v.* Whalley | 2 H. & M. 10 | 674 |
| Freehold General Land Investment Company *v.* Metropolitan District Railway Company | 14 L. T. (N.S.) 96 | 355 |
| Freeman *v.* Lomas | 9 Hare, 109 | 32 |
| Furness *v.* Meek | 27 L. J. (Ex.) 34 | 264 |


## G.


| | | |
|---|---|---|
| Galland *v.* Leonard | 1 Sw. 161 | 223 |
| Garrick *v.* Taylor | 4 D. F. & J. 159 | 596 |
| Gaskell *v.* Gaskell | 6 Sim. 643 | 183 |
| General Exchange Bank *v.* Horner | Law Rep. 9 Eq. 480 | 582 |
| Genery *v.* Fitzgerald | Jac. 468 | 259 |
| Gibson, In re | Law Rep. 2 Eq. 669 | 307 |
| Gilbertson *v.* Gilbertson | 34 Beav. 354 | 472 |
| Gimblett *v.* Purton | Law Rep. 12 Eq. 427 | 648 |
| Gold *v.* Turner | Law Rep. 10 C. P. 149 | 3 |
| Goodlad *v.* Burnett | 1 K. & J. 341 | 306 |
| Goodson *v.* Richardson | Law Rep. 9 Ch. 221 | 150, 464 |
| Goodwyn *v.* Spray | 2 Dick. 667 | 90 |
| Gordon *v.* Gordon | 3 Sw. 400 | 705 |
| Gore Langton's Estates, In re | Law Rep. 10 Ch. 628 | 48, 470 |
| Gosling *v.* Gosling | 3 Drew. 335 | 329 |
| ——— *v.* Veley | 7 Q. B. 406 | 613 |
| Gourlay *v.* Duke of Somerset | 19 Ves. 429 | 109 |

| | | PAGE |
|---|---|---|
| Gravenor *v.* Watkins | Law Rep. 6 C. P. 500 | 187 |
| Gray *v.* Lewis | Law Rep. 8 Ch. 1035 | 389, 477 |
| Great Ship Company, In re | 4 D. J. & S. 63 | 163 |
| Green *v.* Gascoigne | 4 D. J. & S. 565 | 258 |
| Greene *v.* West Cheshire Railway Company | Law Rep. 13 Eq. 44 | 107 |
| Greenlaw *v.* King | 3 Beav. 49 | 79 |
| Green's Case | Law Rep. 18 Eq. 428 | 507 |
| Gregory *v.* Mighell | 18 Ves. 328 | 108 |
| Grey *v.* Jenkins | 26 Beav. 351 | 301 |
| Grimes *v.* Harrison | 27 Beav. 199 | 451 |
| Guest *v.* Smythe | Law Rep. 5 Ch. 551 | 79 |


## H.


| | | |
|---|---|---|
| Hall *v.* Dyson | 17 Q. B. (N.S.) 785 | 69 |
| Haly *v.* Barry | Law Rep. 3 Ch. 452 | 680 |
| Hamilton *v.* Mills | 29 Beav. 193 | 798 |
| Hammersmith and City Railway Company *v.* Brand | Law Rep. 4 H. L. 171 | 545 |
| Hanson, Ex parte | 12 Ves. 346; 18 Ves. 232 | 517 |
| Harbidge *v.* Wogan | 5 Hare, 258 | 668 |
| Harbin *v.* Masterman | Law Rep. 12 Eq. 559 | 258 |
| Hare *v.* London and North Western Railway Company | 2 J. & H. 80 | 481 |
| Harper, Ex parte | Law Rep. 18 Eq. 539 | 41 |
| Harris *v.* Pepperell | Law Rep. 5 Eq. 1 | 797 |
| Harrison *v.* Guest | 8 H. L. C. 481; 6 D. M. & G. 424 | 214 |
| ——— *v.* Mexican Railway Company | Law Rep. 19 Eq. 358 | 61 |
| ——— *v.* Nettleship | 2 My. & K. 423 | 679 |
| Harrop's Estate, Re | 3 Drew. 726 | 258 |
| Hartley's Case | Law Rep. 10 Ch. 157 | 525, 582 |
| Harward's Case | Law Rep. 13 Eq. 30 | 508 |
| Hawkins *v.* Chappel | 1 Atk. 621 | 318 |
| Hayman *v.* Governors of Rugby School | Law Rep. 18 Eq. 28 | 390 |
| Heath *v.* Crealock | Law Rep. 18 Eq. 215; Ibid. 10 Ch. 22 | 246 |
| Hender *v.* Rose | 3 P. Wms. 317, n. | 157 |
| Henry *v.* Great Northern Railway Company | 1 De G. & J. 606 | 559 |
| Hewitt *v.* Loosemore | 9 Hare, 449 | 248 |
| Hichens *v.* Congreve | 1 Russ. & My. 150 | 118 |
| Hiern *v.* Mill | 13 Ves. 114 | 248 |
| Hilton, Ex parte | 1 Jac. & W. 467 | 736 |
| Hindmarsh, In re | 1 Dr. & Sm. 129 | 728 |
| Hobday *v.* Peters | 28 Beav. 354 | 323 |
| Hobson *v.* Ferraby | 2 Coll. 412 | 668 |
| Hodgkinson *v.* National Live Stock Insurance Company | 4 De G. & J. 422 | 477 |
| Hogg *v.* Scott | Law Rep. 18 Eq. 444 | 503 |
| Hoghton *v.* Hoghton | 15 Beav. 278 | 705 |
| Hole *v.* Thomas | 7 Ves. 589 | 90 |
| Holford *v.* Parker | Hob. 246 | 265 |
| Hoiledge's Case | 2 Roll. Rep. 238 | 613 |
| Home *v.* Pillans | 2 My. & K. 15 | 223 |
| Honiball *v.* Bloomer | 10 Ex. 538 | 634 |

| | | PAGE |
|---|---|---|
| Hood *v.* Lord Barrington | Law Rep. 6 Eq. 218 | 419 |
| Hooper *v.* Brodrick | 11 Sim. 47 | 130 |
| Houston *v.* Hughes | 6 B. & C. 403 | 168 |
| Howgrave *v.* Carter | 3 V. & B. 79 | 715 |
| Hughes, Ex parte | 6 Ves. 617 | 79 |
| Hume *v.* Bentley | 5 De G. & Sm. 520 | 53 |
| Humphreys *v.* Humphreys | 2 Cox, 184 | 310 |
| Hunter *v.* Walters | Law Rep. 7 Ch. 75 | 265 |
| Hunt's Case | 37 L. J. (Ch.) 278 | 582 |
| Hutton *v.* Scarborough Cliff Hotel Company | 2 Dr. & Sm. 514 | 61 |


## I.


| | | |
|---|---|---|
| Imperial Gas Light and Coke Company *v.* Broadbent | 7 H. L. C. 600 | 355 |
| Imperial Steam and Household Coal Company | 16 W. R. 689 | 164 |
| Inderwick *v.* Snell | 2 Mac. & G. 216 | 674 |
| Ingram *v.* Southen | Law Rep. 7 H. L. 408 | 222 |
| Inns of Court Hotel Company, In re | Law Rep. 6 Eq. 82 | 341 |
| Insole, In re | Law Rep. 1 Eq. 470 | 180 |
| Isaac, Ex parte | Law Rep. 6 Ch. 58 | 290 |
| Isberg *v.* Bowden | 8 Ex. 852 | 31 |
| Isenberg *v.* East India House Estate Company | 3 D. J. & S. 263 | 502 |
| Izard, Ex parte | Law Rep. 9 Ch. 271 | 751 |


## J.


| | | |
|---|---|---|
| Jackman *v.* Mitchell | 13 Ves. 581 | 69 |
| Jackson *v.* Jackson | 1 Sm. & Giff. 184 | 109, 512 |
| ——— *v.* Woolley | 8 E. & B. 778 | 728 |
| James, Ex parte | Law Rep. 9 Ch. 609 | 779 |
| ——— *v.* James | Law Rep. 16 Eq. 153 | 450 |
| ——— *v.* May | Law Rep. 6 H. L. 328 | 231 |
| Jay, Ex parte | Law Rep. 9 Ch. 133 | 284 |
| Jeffrey's Case | 5 Rep. 66 b | 612 |
| Jenkins *v.* Green | 27 Beav. 437 | 493 |
| Jenner *v.* Jenner | 2 Giff. 232; 2 D. F. & J. 359 | 705 |
| Jessel *v.* Chaplin | 2 Jur. (N.S.) 931 | 502 |
| Jesser *v.* Gifford | 4 Burr. 2141 | 24 |
| Jeyes *v.* Savage | Law Rep. 10 Ch. 555 | 715 |
| Johnson *v.* Baker | 4 B. & A. 440 | 264 |
| ——— *v.* Lander | Law Rep. 7 Eq. 228 | 180 |
| Johnstone *v.* Baber | 6 D. M. & G. 430 | 319 |
| Joint Stock Discount Company *v.* Brown | Law Rep. 8 Eq. 381 | 231 |
| Jones *v.* Beach | 2 D. M. & G. 886 | 569 |
| ——— *v.* Mossop | 3 Hare, 568 | 31 |
| Josselyn *v.* Josselyn | 9 Sim. 63 | 259 |


## K.


| | | |
|---|---|---|
| Kay *v.* Smith | 7 D. M. & G. 383 | 641 |
| Kelk *v.* Pearson | Law Rep. 6 Ch. 809 | 496 |
| Kennedy *v.* Green | 3 My. & K. 699 | 247 |

| | | PAGE |
|---|---|---|
| Kevan, Ex parte | Law Rep. 9 Ch. 752 | 750 |
| Kibble, Ex parte | Law Rep. 10 Ch. 373 | 679 |
| Kidgill *v.* Moor | 9 C. B. 364 | 23 |
| Kilgorn *v.* Finlyson | 1 H. B. 155 | 731 |
| Kincaid's Case | Law Rep. 11 Eq. 192 | 508 |
| Kirby *v.* Potter | 4 Ves. 748 | 310 |
| Knight *v.* Davis | 3 My. & K. 358 | 307 |
| Kynaston *v.* East India Company | 3 Sw. 248 | 512 |


## L.


| | | |
|---|---|---|
| Lambe *v.* Eames | Law Rep. 6 Ch. 597 | 319 |
| Lambton, Ex parte | Law Rep. 10 Ch. 405 | 752 |
| Lancefield *v.* Iggulden | Law Rep. 10 Ch. 136 | 307 |
| Land Credit Company of Ireland *v.* Lord Fermoy | Law Rep. 5 Ch. 763 | 232 |
| Lane's Trusts, In re | 24 L. T. (O.S.) 181 | 563 |
| Langdale (Lady) *v.* Briggs | 8 D. M. & G. 391 | 313 |
| Leech *v.* Schweder | Law Rep. 9 Ch. 463 | 151, 446 |
| Leeds (Duke of) *v.* Earl of Amherst | 2 Ph. 117 | 92 |
| Leeke's Case | Law Rep. 6 Ch. 469 | 508 |
| Lefroy *v.* Gore | 1 J. & Lat. 571 | 231 |
| Lehmann *v.* McArthur | Law Rep. 3 Ch. 496 | 663 |
| Leifchild's Case | Law Rep. 1 Eq. 231 | 582, 591 |
| Leigh's Estate, In re | Law Rep. 6 Ch. 887 | 371 |
| Leighton *v.* Leighton | Law Rep. 18 Eq. 458 | 157 |
| Levick's Case | 40 L. J. (Ch.) 180 | 508 |
| Levy & Co., Ex parte | Law Rep. 11 Eq. 619 | 742 |
| Lewes' Trusts, In re | Law Rep. 6 Ch. 356 | 138 |
| Lewis, Ex parte | Law Rep. 6 Ch. 626 | 751 |
| —— *v.* Madocks | 17 Ves. 48 | 535 |
| Liddy *v.* Kennedy | Law Rep. 5 H. L. 134 | 493 |
| Linford *v.* Gudgeon | Law Rep. 6 Ch. 359 | 679 |
| Lingard *v.* Bromley | 1 V. & B. 114 | 230 |
| Lintott, Ex parte | Law Rep. 4 Eq. 184 | 362 |
| Lister, Ex parte | Mont. & Ch. 260 | 760 |
| —— *v.* Pickford | 34 Beav. 576 | 436 |
| Liverpool Borough Bank *v.* Walker | 4 De G. & J. 24 | 569 |
| Lloyd *v.* Lander | 5 Madd. 282 | 436 |
| Llynvi Company *v.* Brogden | Law Rep. 11 Eq. 188 | 89 |
| Lockhart *v.* Reilly | 1 De G. & J. 464 | 461 |
| Locking *v.* Parker | Law Rep. 8 Ch. 30 | 435 |
| London and Mercantile Discount Company, In re | Law Rep. 1 Eq. 277 | 390 |
| London and Provincial Starch Company, In re | 20 L. T. (N.S.) 390 | 582 |
| London Chartered Bank of Australia *v.* Lempriere | Law Rep. 4 P. C. 572 | 323 |
| London Cotton Company, In re | Law Rep. 2 Eq. 53 | 163 |
| London India Rubber Company, In re | Law Rep. 5 Eq. 519 | 61, 559 |
| Longmate *v.* Ledger | 2 Giff. 157 | 214 |
| Lord *v.* Copper Miners Company | 2 Ph. 740 | 393 |
| Lundy Granite Company, In re | Law Rep. 6 Ch. 462 | 7, 165 |
| Lush's Trusts, In re | Law Rep. 4 Ch. 591 | 323 |
| Lynvi Coal and Iron Company, Ex parte | Law Rep. 7 Ch. 28 | 685 |
| Lytton *v.* Great Northern Railway Company | 2 K. & J. 394 | 107 |

## M.


| | | PAGE |
|---|---|---|
| McCormick *v.* Garnett | 2 Sm. & Giff. 37 | 645 |
| MacDougall *v.* Gardiner | Law Rep. 10 Ch. 606 | 674 |
| ——— *v.* Jersey Imperial Hotel Co. | 2 H. & M. 528 | 390 |
| Macey *v.* Metropolitan Board of Works | 33 L. J. (Ch.) 377 | 355 |
| Mackenzie, Ex parte | 42 L. J. (Bkcy.) 25 | 751 |
| Mackett *v.* Mackett | Law Rep. 14 Eq. 49 | 319 |
| McLachlan *v.* Taitt | 30 L. J. (Ch.) 276 | 720 |
| Madrid Bank *v.* Pelly | Law Rep. 7 Eq. 442 | 582 |
| Malcolm *v.* Martin | 3 Bro. C. C. 50 | 343 |
| Manning *v.* Farquharson | 30 L. J. (Q.B.) 22 | 3 |
| Manningford *v.* Toleman | 1 Coll. 670 | 246 |
| Mare *v.* Sandford | 1 Giff. 288 | 69 |
| —— *v.* Warner | 3 Giff. 100 | 69 |
| Marlborough Club Company, In re | Law Rep. 5 Eq. 365 | 589 |
| Martin *v.* Martin | 12 Sim. 579 | 319 |
| "Mary Ann," The | Law Rep. 1 A. & E. 8 | 326 |
| Marylebone Joint Stock Bank, Re | 25 L. J. (Ch.) 650 | 624 |
| Maunsell *v.* Hedges | 4 H. L. C. 1039 | 624 |
| ——— *v.* Midland Great Western (Ireland) Railway Company | 1 H. & M. 130 | 477 |
| May *v.* Benett | 1 Russ. 370 | 270 |
| Mayor of London *v.* Cox | Law Rep. 2 H. L. 239 | 3, 554 |
| Medlicott *v.* Bowes | 1 Ves. Sen. 207 | 35 |
| Melhado *v.* Hamilton | 21 W. R. 619 | 61 |
| Menier *v.* Hooper's Telegraph Works | Law Rep. 9 Ch. 350 | 390 |
| Merchants' Banking Company *v.* Maud | Law Rep. 20 Eq. 152 | 655 |
| Middleton *v.* Pollock | Law Rep. 20 Eq. 29 | 160 |
| Miles *v.* Harrison | Law Rep. 9 Ch. 316 | 472 |
| Miller *v.* Little | 2 Beav. 259 | 310 |
| Millership *v.* Brookes | 5 H. & N. 797 | 264 |
| Mills *v.* Druitt | 20 Beav. 632 | 437 |
| —— *v.* Fowkes | 5 Bing. N. C. 455 | 727 |
| Milnes *v.* Gery | 14 Ves. 400 | 109, 512 |
| Milward *v.* Earl Thanet | 5 Ves. 720, n. | 663 |
| Mollwo, March, & Co. *v.* Court of Wards | Law Rep. 4 P. C. 419 | 334 |
| Morgan, Ex parte | 10 Ves. 101 | 437 |
| ——— *v.* Griffith | Law Rep. 6 Ex. 70 | 446 |
| ——— *v.* Morgan | Law Rep. 10 Eq. 99 | 696 |
| ——— *v.* Rowlands | Law Rep. 7 Q. B. 493 | 728 |
| Morgan's Settled Estates, In re | Law Rep. 9 Eq. 587 | 352 |
| Morphett *v.* Jones | 1 Sw. 172 | 662 |
| Morrell *v.* Fisher | 4 De G. & Sm. 432 | 472 |
| Morris *v.* Wilson | 5 Jur. (N.S.) 168 | 15, 419 |
| Mott *v.* Shoolbred | Law Rep. 20 Eq. 22 | 465 |
| Mozley *v.* Alston | 1 Ph. 790 | 389, 477 |
| Mumford *v.* Oxford, Worcester, and Wolverhampton Railway Company | 1 H. & N. 34; 25 L. J. (Ex.) 265 | 24 |
| Mundy *v.* Jolliffe | 5 My. & Cr. 167 | 108 |
| Murray *v.* Earl of Stair | 2 B. & C. 82 | 264 |
| ——— *v.* Reeves | 8 B. & C. 421 | 69 |
| Muschamp *v.* Bluet | Bridgm. 137 | 188 |


## N.


| | | |
|---|---|---|
| Nash *v.* Coombs | Law Rep. 6 Eq. 51 | 407 |
| New Brunswick and Canada Railway and Land Company *v.* Conybeare | 9 H. L. C. 711 | 121 |

| | | PAGE |
|---|---|---|
| Newbold and Metropolitan Railway Company, In re | 14 C. B. (N.S.) 405 | 41 |
| Newell *v.* Radford | Law Rep. 3 C. P. 52 | 15 |
| Newton *v.* Newton | Law Rep, 6 Eq. 135 | 246 |
| Nokes *v.* Gibson | 5 W. R. 216; 26 L. J. (Ch.) 208 | 633 |
| North Eastern Railway Company *v.* Jackson | 22 W. R. 629 | 654 |
| Nunn *v.* Fabian | Law Rep. 1 Ch. 35 | 662 |

O.

| | | |
|---|---|---|
| Oakes *v.* Turquand | Law Rep. 2 H. L. 325 | 363 |
| Oddie *v.* Brown | 4 De G. & J. 179 | 258 |
| O'Ferrall, Ex parte | 1 Gly. & J. 347 | 645 |
| O'Loghlen, Ex parte | Law Rep. 6 Ch. 406 | 735 |
| O'Mahoney *v.* Burdett | Law Rep. 7 H. L. 388 | 222 |
| Other *v.* Iveson | 3 Drew. 177 | 569 |

P.

| | | |
|---|---|---|
| Page, Ex parte | 25 L. T. (N.S.) 716 | 781 |
| —— *v.* Leapingwell | 18 Ves. 463 | 380 |
| Palmer *v.* Fletcher | 1 Lev. 122 | 445 |
| Palmer's Settlement Trusts, In re | Law Rep. 19 Eq. 320 | 380 |
| Paris Chocolate Company *v.* Crystal Palace Company | 3 Sm. & Giff. 119 | 110 |
| Parrott *v.* Worsfold | 1 Jac. & W. 594 | 306 |
| Pearce *v.* Lindsay | 1 D. F. & J. 573 | 654 |
| Pearse *v.* Edmeades | You. 357 | 344 |
| Peek *v.* Gurney | Law Rep. 6 H. L. 377 | 119 |
| Pemberton *v.* Barnes | Law Rep. 6 Ch. 685 | 530 |
| Peto *v.* Brighton, Uckfield, and Tunbridge Wells Railway Company | 1 H. & M. 468 | 130 |
| Phené *v.* Gillan | 5 Hare, 1 | 62, 231 |
| Phené's Trusts, In re | Law Rep. 5 Ch. 139 | 137 |
| Phipps *v.* Ackers | 9 Cl. & F. 583; 4 Man. & G. 1107; 3 Cl. & F. 702 | 719 |
| Phosphate of Lime Company *v.* Green | Law Rep. 7 C. P. 43 | 61 |
| Playfair *v.* Cooper | 17 Beav. 187 | 270 |
| Pope *v.* Whitcombe | 3 Mer. 689 | 411 |
| Porter's Case | 1 Rep. 16 b. | 488 |
| Potter *v.* Duffield | Law Rep. 18 Eq. 4 | 15, 418 |
| Poulsum *v.* Thirst | Law Rep. 2 C. P. 449 | 629 |
| Powell *v.* Powell | Law Rep. 10 Ch. 130 | 538 |
| Pratt *v.* Pratt | Fitz-Gibb. 284 | 157 |
| Price *v.* Torrington | 1 Salk. 285; 1 Sm. L. C. 290 | 247 |
| Pringle *v.* Pringle | 22 Beav. 631 | 797 |
| Pritchard's Case | Law Rep. 8 Ch. 956 | 525 |
| Pullen *v.* Ready | 2 Atk. 587; Tud. L. C. in Eq. 840 | 706 |

Q.

| | | |
|---|---|---|
| Quartly *v.* Timmins | Law Rep. 9 C. P. 416 | 3 |

## R.


| | | PAGE |
|---|---|---|
| Ramsden *v.* Lupton | Law Rep. 9 Q. B. 17 | 751, 787 |
| Rawlins *v.* Burgess | 2 V. & B. 382 | 434 |
| Rawson *v.* Samuel | Cr. & Ph. 161 | 32 |
| Redfern, Ex parte | 19 W. R. 1058 | 751 |
| Reed, Ex parte | Law Rep. 14 Eq. 586 | 752 |
| Reg. *v.* Cooper | Law Rep. 5 Q. B. 457 | 390 |
| —— *v.* East and West India Docks Company | 2 E. & B. 474 | 549 |
| —— *v.* Garland | Law Rep. 5 Q. B. 269 | 169 |
| —— *v.* Godmanchester Local Board | Law Rep. 1 Q. B. 328 | 628 |
| —— *v.* Justices of Derbyshire | 7 Q. B. 193 | 727 |
| —— *v.* Mayor of Tewkesbury | Law Rep. 3 Q. B. 629 | 614 |
| —— *v.* Wycombe Railway Company | Law Rep. 2 Q. B. 310 | 550 |
| Rex *v.* White | 1 Burr. 334 | 628 |
| Reynolds *v.* Bowley | Law Rep. 2 Q. B. 41, 474 | 400 |
| Rhodes *v.* Airedale Drainage Commissioners | Law Rep. 9 C. P. 508 | 41 |
| Richardson *v.* Richardson | 14 Sim. 526 | 411 |
| ——— *v.* Smith | Law Rep. 5 Ch. 648 | 110, 512 |
| ——— *v.* Squibb | 1 Ld. Raym. 726 | 408 |
| Riche *v.* Ashbury Railway Carriage and Iron Company | Law Rep. 9 Ex. 224 | 61 |
| Robinson *v.* Emanuel | Law Rep. 9 C. P. 414 | 3, 554 |
| ——— *v.* Waddington | 13 Q. B. 753 | 727 |
| Robson *v.* Whittingham | Law Rep. 1 Ch. 442 | 496 |
| Rocke, Ex parte | Law Rep. 6 Ch. 795 | 285 |
| Roebuck *v.* Chadebet | Law Rep. 8 Eq. 127 | 530 |
| Rolfe *v.* Flower | Law Rep. 1 C. P. 27 | 728 |
| Rolland *v.* Hart | Law Rep. 6 Ch. 678 | 247 |
| Rooke *v.* Lord Kensington | 2 K. & J. 753 | 797 |
| Russell, Ex parte | 5 D. M. & G. 373 | 293 |
| ———, Ex parte | Law Rep. 10 Ch. 255 | 776 |
| ——— *v.* East Anglian Railway Company | 3 Mac. & G. 104 | 285 |


## S.


| | | |
|---|---|---|
| Sale *v.* Lambert | Law Rep. 18 Eq. 1 | 16, 419 |
| Salomons *v.* Laing | 12 Beav. 377 | 478 |
| Salter *v.* Cavanagh | 1 D. & Wal. 668 | 434 |
| Sanderson *v.* Cockermouth and Workington Railway Company | 11 Beav. 497; 2 H. & Tw. 327 | 493 |
| Sarel *v.* Sarel | 23 Beav. 87 | 344 |
| Saunders *v.* Vautier | 4 Beav. 115; Cr. & Ph. 240 | 259 |
| Savage *v.* Foster | 9 Mod. 35 | 322 |
| Scholes *v.* Hargreaves | 5 T. R. 46 | 407 |
| Scott *v.* Lord Hastings | 4 K. & J. 633 | 679 |
| Sells *v.* Sells | 1 Dr. & Sm. 42 | 797 |
| Sharp *v.* Milligan | 22 Beav. 606 | 662 |
| Sharpe *v.* Foy | Law Rep. 4 Ch. 35 | 323 |
| Sharp's Patent, In re | 3 Beav. 245 | 346 |
| Shaw's Settled Estates, In re | Law Rep. 14 Eq. 9 | 469 |
| Sheffield *v.* Kennett | 27 Beav. 207; 4 De G. & J. 593 | 715 |
| Shepherd *v.* Churchill | 25 Beav. 21 | 21 |
| ——— *v.* Keatley | 1 C. M. & R. 117 | 55 |
| Sheppard *v.* Shephard | 32 Beav. 194 | 271 |
| Sherrard *v.* Lord Harborough | Amb. 164 | 319 |

| | | PAGE |
|---|---|---|
| Sidney *v.* Sidney | Law Rep. 17 Eq. 65 | 306 |
| Sidney's Case | Law Rep. 13 Eq. 228 | 508 |
| Simpson *v.* Denison | 10 Hare, 51 | 481 |
| ——— *v.* Savage | 1 C. B. (N.S.) 347; 26 L. J. (C.P.) 50 | 24, 543 |
| ——— *v.* Westminster Palace Hotel Company | 8 H. L. C. 712 | 481 |
| Simson *v.* Ingham | 2 B. & C. 65 | 727 |
| Skidmore *v.* Bradford | Law Rep. 8 Eq. 134 | 215 |
| Smale *v.* Burr | Law Rep. 8 C. P. 64 | 787 |
| Smallman *v.* Goolden | 1 Cox, 329 | 306 |
| ——— *v.* Onions | 3 Bro. C. C. 621 | 90 |
| Smith *v.* Buller | Law Rep. 19 Eq. 473 | 634, 655 |
| ——— *v.* Iliffe | Law Rep. 20 Eq. 666 | 802 |
| ——— *v.* Streatfield | 1 Mer. 358 | 344 |
| ——— *v.* Timms | 1 H. & C. 849 | 765 |
| Smith's Case | Law Rep. 2 Ch. 604 | 121 |
| Smyth *v.* North | Law Rep. 7 Eq. 242 | 685 |
| Snowball, Ex parte | Law Rep. 7 Ch. 534 | 751 |
| Society for Illustration of Practical Knowledge *v.* Abbott | 2 Beav. 559 | 118 |
| Sorsbie *v.* Park | 12 M. & W. 146 | 569 |
| Southcomb *v.* Bishop of Exeter | 6 Hare, 213 | 663 |
| Spiretts *v.* Willows | Law Rep. 4 Ch. 407 | 796 |
| Spratt *v.* Jeffery | 10 B. & C. 249 | 55 |
| Stansfeld *v.* Cubitt | 2 De G. & J. 222 | 787 |
| Stapilton *v.* Stapilton | 1 Atk. 2; T. L. C. in Eq. 4th Ed. 824 | 705 |
| Stearic Acid Company, Re | 11 W. R. 980. | 363 |
| Stedman *v.* Smith | 8 E. & B. 1 | 89 |
| Stephens, Ex parte | 11 Ves. 24 | 516 |
| Stephenson *v.* Dowson | 3 Beav. 342 | 306 |
| Stevenson *v.* Mayor of Liverpool | Law Rep. 10 Q. B. 81 | 170 |
| Stewart *v.* Denton | 4 Doug. 219 | 309 |
| ——— *v.* Stewart | 6 Cl. & F. 911 | 705 |
| Stocker *v.* Brocklebank | 3 Mac. & G. 250 | 334 |
| Stockport District Waterworks Company *v.* Corporation of Manchester | 9 Jur. (N.S.) 266 | 131 |
| Stock's Case | 4 D. J. & S. 426 | 508 |
| Storer *v.* Great Western Railway Company | 2 Y. & C. Ch. 48 | 107 |
| Stranton Iron and Steel Company, In re | Law Rep. 16 Eq. 559. | 390 |
| Stringer *v.* Harper | 20 Beav. 585 | 472 |
| Strode *v.* Lady Falkland | 2 Vern. 621; 3 Rep. in Ch. 90 | 434 |
| Stuart (Lord J.) *v.* London and North Western Railway Company | 1 D. M. & G. 721 | 493 |
| Suggitt's Trusts, In re | Law Rep. 3 Ch. 215 | 646, 798 |
| Sumner *v.* Powell | 2 Mer. 30; T. & R. 423 | 570 |
| Sydney, Ex parte | Law Rep. 10 Ch. 208 | 773 |


## T.


| | | |
|---|---|---|
| Taddy's Settled Estates, In re | Law Rep. 16 Eq. 532 | 469 |
| Taggart *v.* Taggart | 1 Sch. & Lef. 84 | 796 |
| Tait, Ex parte | Law Rep. 13 Eq. 311 | 736 |
| Tanner *v.* Smart | 6 B. & C. 603 | 728 |
| Tarbottom *v.* Earle | 11 W. R. 680 | 270 |
| Taylor *v.* Frobisher | 5 De G. & Sm. 191 | 648 |
| Teape's Trusts, In re | Law Rep. 16 Eq. 442 | 602 |

| | | PAGE |
|---|---|---|
| Tempest, Ex parte | Law Rep. 6 Ch. 70 | 765 |
| Thomas *v.* Dering | 1 Keen, 729 | 54 |
| ——— *v.* Hole | Cas. t. Tal. 251 | 411 |
| ——— *v.* Thomas | 2 Dr. & Sm. 298 | 139 |
| Thompson *v.* Cartwright | 33 Beav. 178; 2 D. J. & S. 10. | 248 |
| ——— *v.* Grant | 4 Madd. 438 | 436 |
| ——— *v.* Waithman | 3 Drew. 628 | 731 |
| ——— *v.* Webster | 4 De G. & J. 600 | 215 |
| ——— *v.* Whitmore | 1 J. & H. 268 | 797 |
| Thompson's Trusts, In re | 22 Beav. 506 | 260 |
| Thorpe *v.* Jackson | 2 Y. & C. (Ex.) 553 | 569 |
| Tidd *v.* Lister | 5 Madd. 429 | 301 |
| Till, Ex parte | Law Rep. 16 Eq. 97 | 283 |
| Tilleard, In re | 3 D. J. & S. 519 | 199 |
| Tillett *v.* Charing Cross Bridge Company | 26 Beav. 419 | 108 |
| Tilson *v.* Warwick Gas Company | 4 B. & C. 962 | 199 |
| Tipperary Election Case | Ir. Rep. 9 C. L. 217 | 613 |
| Tipping *v.* Eckersley | 2 K. & J. 264 | 151 |
| Topham, Ex parte | Law Rep. 8 Ch. 614 | 751 |
| Torre *v.* Torre | 1 Sm. & Giff. 518 | 668 |
| Townend *v.* Toker | Law Rep. 1 Ch. 446 | 214 |
| Trench *v.* Nolan | Ir. Rep. 6 C. L. 464 | 613 |
| Trinder *v.* Trinder | Law Rep. 1 Eq. 695 | 307 |
| Trueman *v* Loder | 11 A. & E. 589 | 15 |
| Tucker *v.* Tucker | 4 B. & Ad. 745 | 31 |
| Turner *v.* Turner | 7 W. R. 573 | 634 |
| Twort *v.* Twort | 16 Ves. 128 | 90 |
| Tyrrell *v.* Bank of London | 10 H. L. C. 26 | 582 |

## U.

| | | |
|---|---|---|
| United States of America *v.* Wagner | Law Rep. 2 Ch. 582 | 143 |

## V.

| | | |
|---|---|---|
| Varley, Ex parte | 3 M. D. & D. 340 | 686 |
| Vaughan *v.* Vanderstegen | 2 Drew. 363 | 323 |
| Vickers *v.* Vickers | Law Rep. 4 Eq. 529 | 108, 512 |
| Vivers *v.* Tuck | 1 Moo. P. C. (N.S.) 516 | 214 |
| Vulliamy *v.* Noble | 3 Mer. 593 | 516 |

## W.

| | | |
|---|---|---|
| Waite *v.* Littlewood | Law Rep. 8 Ch. 70 | 380 |
| Wallworth *v.* Holt | 4 My. & Cr. 619 | 480 |
| Walsh *v.* Watson | Law Rep. 8 Ch. 482 | 798 |
| Ware *v.* Cann | 10 B. & C. 433 | 187 |
| Warren, Ex parte | Law Rep. 10 Ch. 222 | 284 |
| ——— *v.* Richardson | You. 1 | 55 |
| Waterer, Ex parte | 22 W. R. 426 | 773 |
| Watson *v.* Pears | 2 Camp. 294 | 727 |
| ——— *v.* Pearson | 2 Ex. 581 | 170 |
| Watson's Trusts, In re | Law Rep. 10 Eq. 36 | 715 |
| Way *v.* Bassett | 5 Hare, 55 | 727 |
| Webb *v.* De Beauvoisin | 31 Beav. 573 | 472 |

| | | PAGE |
|---|---|---|
| Webster's Settled Estates, In re | 2 Sm. & Giff. App. vi. | 470 |
| Wentworth *v.* Lloyd | Law Rep. 2 Eq. 607 | 654 |
| Western *v.* Macdermott | Law Rep. 2 Ch. 72 | 151 |
| Western Bank of Scotland *v.* Addie | Law Rep. 1 H. L., Sc. 145 | 623 |
| Whatman *v.* Gibson | 9 Sim. 196 | 151 |
| Whitaker *v.* Rush | Amb. 407 | 160 |
| Whitbread *v.* St. John | 10 Ves. 152 | 649 |
| White *v.* Cuddon | 8 Cl. & F. 766 | 687 |
| Whyte *v.* O'Brien | 1 S. & S. 551 | 32 |
| Wildes *v.* Dudlow | Law Rep. 19 Eq. 198 | 215 |
| Wilkinson *v.* Haygarth | 12 Q. B. 837 | 89 |
| ——— *v.* Nelson | 9 W. R. 393 | 798 |
| Willats *v.* Busby | 5 Beav. 193 | 215 |
| Willes *v.* Douglas | 10 Beav. 47 | 343 |
| Williams *v.* Byrnes | 9 Jur. (N.S.) 363 | 420 |
| ——— *v.* Davis | 2 Sim. 461 | 36 |
| ——— *v.* Games | Law Rep. 10 Ch. 204 | 530 |
| ——— *v.* Harding | Law Rep. 1 H. L. 9 | 783 |
| ——— *v.* Lake | 2 E. & E. 349 | 420 |
| Wills *v.* Stradling | 3 Ves. 378 | 662 |
| Wilmer *v.* Currey | 2 De G. & Sm. 347 | 570 |
| Wilson *v.* Goodman | 4 Hare, 54 | 230 |
| ——— *v.* Mount | 19 Beav. 292 | 715 |
| ——— *v.* West Hartlepool Railway Company | 2 D. J. & S. 475 | 108 |
| Wilton *v.* Colvin | 3 Drew. 617 | 536 |
| Winter *v.* Innes | 4 My. & Cr. 101 | 727 |
| Wolherbeck *v.* Barrow | 23 Beav. 423 | 668 |
| Wood *v.* Barker | Law Rep. 1 Eq. 139 | 69 |
| Woodcock *v.* Duke of Dorset | 3 Bro. C. C. 569 | 715 |
| Worthington *v.* Jeffries | Law Rep. 10 C. P. 379 | 554 |
| Wright *v.* Callender | 2 D. M. & G. 652 | 270 |
| ——— *v.* Hunter | 5 Ves. 792 | 230 |
| Wycombe Railway Company *v.* Donnington Hospital | Law Rep. 1 Ch. 268 | 109 |
| Wylly's Trusts, Re | 28 Beav. 458 | 563 |


## Y.


| | | |
|---|---|---|
| Yates *v.* Jack | Law Rep. 1 Ch. 295 | 496 |
| Young *v.* Fletcher | 3 H. & C. 732 | 751 |
| ——— *v.* Macintosh | 13 Sim. 445 | 796 |

## NOTE AS TO THE REFERENCE TO RECORD NOW PRINTED WITH THE TITLE OF EACH CAUSE.

The Reference to Record, which is noted on the bill, gives the year of filing, the initial letter of the surname of first Plaintiff, and the consecutive number of the bills of that year and letter, and leads to the file of pleadings in the Record and Writ Clerk's Office.

The year, letter, and number, also lead to the entry of the cause in the Cause Books. The Cause Books commence in the year 1842. As to causes commenced before the 2nd of November, 1852, they contain the dates of pleadings and formal proceedings. As to subsequent causes they contain, in addition to these particulars, the dates of all decrees, orders, reports, and certificates made since the 30th of November, 1855. In these books there is entered against every decree or order a reference to the volume and folio of the Registrar's Books for the year, where the decree or order will be found *in extenso*.

No reference is written against reports or certificates, but the dates, extracted from the Cause Book, lead to the corresponding entries in the Volumes of Reports and Certificates, and the Index thereto.

The Cause Books are kept in the Record and Writ Clerk's Office.

The Registrar's Books and the Index thereto, and the Reports and Certificates and the Index thereto called the Calendar of Reports, are kept in the Report Office, a branch of the Record and Writ Clerk's Office under the same roof.

For the time of commencement of year in the "Registrar's Books," see 1 Seton, pp. 2, 3.

When the Reference to Record is not known, it may be found by searching for the necessary period the Index to Cause Books kept in the Record and Writ Clerk's Office.

In searching for decrees, orders, reports, and certificates made in causes commenced before the 2nd of November, 1852, or made in subsequent causes before the 30th of November, 1855, or made in matters, the old method must still be followed, viz.:

If a decree or order is required, search in the Report Office the Index to the Registrar's Books; if a report or certificate, search in the same office the Calendar of Reports. The Index to the Registrar's Books gives the reference to the Registrar's Books, and the Calendar of Reports the reference to the Volumes of Reports and Certificates.

Affidavits are filed in the Record and Writ Clerk's Office, where the Index thereto may be searched.

Petitions are filed in the Report Office, where the Index thereto may be searched.

# Equity Cases

(*Including Bankruptcy Cases*)

BEFORE

## THE MASTER OF THE ROLLS,

THE

## VICE-CHANCELLORS,

AND THE

## CHIEF JUDGE IN BANKRUPTCY.

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### JACOBS *v.* BRETT.

M. R.

1875

April 15, 16.

*Lord Mayor's Court—Want of Jurisdiction—Prohibition at instance of Defendant—Mayor's Court of London Procedure Act*, 1857 (20 & 21 *Vict. c. clvii.*), *s.* 15.

The Defendant in an action in the Lord Mayor's Court may obtain a writ of prohibition, notwithstanding the 15th section of the *Mayor's Court of London Procedure Act*, 1857, which enacts that "no defendant shall be permitted to object to the jurisdiction of the Court in or by any proceeding whatsoever except by plea;" the real effect of that section being only to limit the modes of objecting within the Lord Mayor's Court to the jurisdiction.

*Manning* v. *Farquharson* (1) not followed.

IN this case the Plaintiff had commenced an action for libel in the Lord Mayor's Court against Sir *W. B. Brett*, one of the Justices of the Court of Common Pleas, claiming damages to the amount of £5000. Thereupon Messrs. *Raven & Hare*, the Defendant's attorneys, obtained a writ of prohibition out of Chancery upon an affidavit made by one of their clerks, stating that neither the

(1) 30 L. J. (Q.B.) 22.

M. R. 1875 JACOBS v. BRETT.

Plaintiff nor the Defendant lived in the City of *London;* that the alleged libel was contained in a letter written by the Defendant, and sent, closed up, to the Lord Chief Justice and Judges of the Court of Queen's Bench at *Westminster*, where it was delivered to them, and consequently that the alleged publication did not take place within the City of *London*, and that the letter was written at Judges' Chambers, not in the City of *London;* and that he was advised and believed that no part of the cause of action arose within the Lord Mayor's Court. The writ had an indorsement stating that it was issued by Messrs. *Raven & Hare*, "attorneys for the Defendant."

The Plaintiff in person now moved to discharge the writ, on the grounds, first, that the issue of the writ was contrary to the provisions of the *Mayor's Court of London Procedure Act* (20 & 21 Vict. c. clvii.) (1); and, secondly, that the cause of action did arise within the jurisdiction of the Lord Mayor's Court. The Plaintiff (acting, as he stated, under advice) filed no affidavit in opposition to that on which the writ was obtained, and after opening the motion asked leave to file further evidence. This was refused, and the argument turned on sect. 15 of the *Mayor's Court Procedure Act.*

Mr. *C. S. C. Bowen*, for the Defendant:—

The writ was not obtained by the Defendant, but, in accordance with the practice of the Court of Common Pleas, was obtained by

(1) This Act is entitled "An Act for abolishing certain Jurisdiction of the Sheriff's Courts of the City of *London*, and for amending the Process, Practice, and Mode of Pleading in the Mayor's Court, and for extending the jurisdiction thereof." The preamble contains a recital that "it is expedient to make the Mayor's Court more efficient by extending its powers and simplifying its practice and mode of procedure." The material clauses are as follows:—

Sect. 12: "Where the debt or damage claimed in any action shall not exceed the sum of £50, no plea to the jurisdiction shall be allowed, provided the Defendant, or one of the Defendants, shall dwell or carry on business within the City of *London* or the liberties thereof at the time of an action brought; or provided the Defendant, or one of the Defendants, shall have dwelt or carried on business at some time within six months next before the time of the action brought; or if the cause of action, either wholly or in part, arose therein."

Sect. 15: "No Defendant shall be permitted to object to the jurisdiction of the Court in or by any proceeding whatsoever, except by plea."

the attorneys personally. The case therefore falls within the decision in *Mayor of London* v. *Cox* (1).

If this be not so, the question arises whether *Manning* v. *Farquharson* (2) can be held law, having regard to *Mayor of London* v. *Cox;* and it is submitted that it cannot.

The effect of want of jurisdiction in an inferior Court to try an action brought in it, is twofold. First of all, the action may be treated as an encroachment on the jurisdiction of a superior Court, and this was the ground of the writ of prohibition: *De Haber* v. *Queen of Portugal* (3). Secondly, the want of jurisdiction is a good defence to the action, and the objection may be taken in the inferior Court in many ways, as, for example, by demurrer (for the declaration ought to shew that the inferior Court had jurisdiction); by plea in bar; by evidence at the trial; possibly by motion *non obstante veredicto*, or by motion in arrest of judgment; or by writ of error, or by appearance under protest and motion to stay proceedings. Previously to the passing of the *Mayor's Court Procedure Act*, there were certainly three or four ways of taking the objection in the Mayor's Court, all independent of any application to an outside Court.

That being so, the *Mayor's Court of London Procedure Act*, 1857, is passed for the purpose of dealing with the procedure and practice of the Lord Mayor's Court, and I submit that sect. 15 deals with those matters only, and does not alter the jurisdiction of the Court. It is quite settled that sect. 12 does not extend the jurisdiction: *Robinson* v. *Emanuel* (4); *Quartly* v. *Timmins* (5); *Gold* v. *Turner* (6). The object of sect. 15 is simply to say that, whereas the defence of want of jurisdiction might previously have been taken in many different ways, it was thenceforth to be raised only by plea. There was no intention to deprive the superior Courts of any jurisdiction, and there are no words sufficient for that purpose. It would be extraordinary if a Court of inferior jurisdiction were made the judge of the extent of its own jurisdiction. The language of the section shews that it refers only to

(1) Law Rep. 2 H. L. 239.
(2) 30 L. J. (Q.B.) 22.
(3) 17 Q. B. 171, 196; 20 L. J. (Q.B.) 488.
(4) Law Rep. 9 C. P. 414.
(5) Ibid. 416.
(6) Ibid. 10 C. P. 149.

M. R. 1875 JACOBS v. BRETT.

raising the defence in the Mayor's Court. No Defendant is to be "permitted" to object except by plea, that is, to be permitted by the Lord Mayor's Court, in which the Defendant is to plead.

It is true that a different conclusion was arrived at by *Crompton*, J., in *Manning* v. *Farquharson* (1), and that the same learned Judge afterwards expressed approval of the decision when delivering the judgment of the Court of Exchequer Chamber in *Cox* v. *Mayor of London* (2); but it is obvious that the Judges, consulted by the House of Lords in *Mayor of London* v. *Cox*, disapproved of it: as appears by their opinion, delivered by *Willes*, J. (3). It will be found, on examining the judgment of *Crompton*, J., in *Manning* v. *Farquharson*, that that learned Judge appears to have doubted whether a stranger could have prohibition since the statute. That question has been completely settled by the House of Lords in *Mayor of London* v. *Cox;* and it would be an extraordinary result if the Defendant could not have prohibition, while all the rest of the world can.

It is right to mention that *Manning* v. *Farquharson* was followed by the Court of Common Pleas in the recent case of *Baker* v. *Clark* (4). That, however, was merely an *ex parte* application by the Defendant in the action; the Court in effect suggested that the application had better be made in the name of a stranger, and accordingly that was done next day. In the more recent case of *Quartly* v. *Timmins* (5), *Keating*, J., threw doubt on *Manning* v. *Farquharson*.

The Plaintiff was heard in reply.

SIR G. JESSEL, M.R.:—

I very much regret for my own sake as well as the Plaintiff's that the Plaintiff has not had the assistance of counsel in a case of so much importance and difficulty.

The facts of the case are few and simple, and they are contained in a single affidavit which has not been answered. Before stating them, I must notice a suggestion or application made to me yes-

(1) 30 L. J. (Q.B.) 22. 6 Jur N.S. 1360
(2) 3 H. & C. 402; 32 L. J. (Ex.) 282. 8 Jur N.S. 542 9 Jur N.S. 800
(3) Law Rep. 2 H. L. 259.
(4) Ibid. 8 C. P. 121.
(5) Ibid. 9 C. P. 416.

terday, on the part of the Plaintiff, after he had brought on his motion, to add to the evidence. He told me that he had purposely abstained from answering the affidavit because, having taken legal advice on the subject, he had been told that was the best course. Even if he had not been so advised, I should have hesitated long before interfering with the thoroughly well-established practice of this Court, that no man is entitled, as of right, to add to the evidence on a motion, after electing deliberately to open it; but inasmuch as the Plaintiff had taken that course, not ignorantly or *per incuriam*, but deliberately and advisedly, I saw no ground whatever for granting him any indulgence.

The matter stands in this way:—[His Honour stated the facts to the effect set forth above, and continued:—] Of late years, applications for writs of prohibition have usually been made to the Common Law Courts, but I am told there were some special reasons which induced the application to be made in the present case to the Court of Chancery, which has an ancient and undoubted jurisdiction to grant the writ. The affidavit on which the application was founded appears to be regular, and the prohibition issued as a matter of course. The first suggestion made on the part of the Defendant was, that the writ was issued really, not by the Defendant, but by his attorneys in their own persons, and acting for themselves. I am unable to accede to that suggestion; for the writ is indorsed by Messrs. *Raven & Hare*, "attorneys for the Defendant;" it must, therefore, be treated as a writ issued by the Defendant himself. I am therefore driven to consider and decide the important point whether the Defendant in an action in the Lord Mayor's Court, in a case in which that Court has no jurisdiction, is still entitled to restrain that action by writ of prohibition, as he undoubtedly could have done before the passing of the *Mayor's Court of London Procedure Act*, 1857. Now the nature and effect of a writ of prohibition have been made more familiar to us than formerly from the elaborate discussion which the subject underwent in the case of *Mayor of London* v. *Cox* (1); and it is perfectly plain that either the Crown or any subject may intervene and inform a superior Court that an inferior Court is exceeding its jurisdiction; and it is the duty of the superior Court, when

(1) Law Rep. 2 H. L. 239.

M. R. 1875 JACOBS v. BRETT.

it is so informed, to confine the inferior Court within the limits of its jurisdiction. In an ordinary case, therefore, the writ is a matter of course, and, in the Court of Chancery, has for a long time been issued upon the production of an affidavit to the like effect with that which I have just stated. It is now said that the *Mayor's Court of London Procedure Act* has taken away that right, not from all the world, but from one person out of all the world, viz., the Defendant in the action. It is supposed that it is a reasonable interpretation of the section of the Act that it prohibits the Defendant in the action from restraining the legal proceedings in the Lord Mayor's Court, but allows all the rest of the world to take the necessary steps to restrain that action, so that although the Defendant cannot do it himself, he can ask anybody else to do it for him. It seems to me that if any possible escape could be found by reasonable interpretation from any such absurd conclusion, it would be the duty of the Court to find it; but so far from that being necessary, it appears to me that the plain and clear meaning of the Act points in an entirely contrary direction. In the first place, it must not be forgotten that this is what is commonly called a local Act; one, not for the government of the whole of Her Majesty's subjects, but restricted to a locality. It is also evident, when we come to look at its title and its preamble, that it is for a double purpose (I leave out of question the Sheriffs' Court, and confine myself to the Mayor's Court), viz., to amend the process, practice, and mode of pleading in the Mayor's Court, and to extend the jurisdiction thereof. That is, it leaves the Court a Court of inferior jurisdiction, but extends its jurisdiction by express words in certain cases. I should have thought that was a very strong argument to shew that there was no extension of jurisdiction by implication. When you find it passed for the express purpose of extending the jurisdiction, and when you find it extending the jurisdiction by express terms, in certain cases, it is very unlikely that the jurisdiction should be extended by mere implication in other cases. In the next place, I think nothing is better settled than that an Act of Parliament which takes away the jurisdiction of a superior Court of Law must be expressed in clear terms. I do not mean to say that it may not be done by necessary implication as well as by express words, but

M. R.
1875
JACOBS
v.
BRETT.

at all events it must be done clearly. It is not to be assumed that the Legislature intends to destroy the jurisdiction of a superior Court. You must find the intention not merely implied, but necessarily implied. There is another principle, which is, that the general rights of the Queen's subjects are not hastily to be assumed to be interfered with and taken away by Acts of Parliament. Upon that point I may refer to the judgments delivered by the Lords Justices in *In re Lundy Granite Company* (1), which I think shew that that is the true view to be taken in considering Acts of Parliament, even where it is doubtful whether they do or do not take away such rights. [His Honour then read the judgments.]

Now here the subject has a right, and it is a valuable right, of having the question of the jurisdiction of a local Court determined in the superior Court, and is it to be assumed that that right was to be taken away, and that he was to be compelled to submit the question of jurisdiction to the inferior Court itself? I think that is very unlikely. There are two sections of the Act to be noticed, the 12th and the 15th. [His Honour read them.] Now if the 15th section has the meaning which it is said to have, the result would be that the 12th section, taking away the plea in the cases named, would deprive the party of any means whatever of questioning the jurisdiction of the Lord Mayor's Court in the cases mentioned in the 12th section. But that has not been the course of decision. It has been held that you may have prohibition, notwithstanding the amount is less than the £50 mentioned in the 12th section. But do the words of the 15th section take away the jurisdiction of the superior Court? Not at all. The only person that section affects is the Defendant. If, therefore, it was intended by the Legislature to enlarge the jurisdiction of the Lord Mayor's Court, the Legislature has not effected its purpose, because there is nothing to prevent any one except the Defendant from applying for a writ of prohibition, and consequently everybody else is left at liberty to apply for the writ. That alone shews how extremely improbable it is that that could be the meaning of it. Then the section says: "No Defendant shall be permitted to object to the jurisdiction." Permitted by whom?

(1) Law Rep. 6 Ch. 465–468.

M. R. 1875 JACOBS v. BRETT.

The natural answer is, "By the Lord Mayor's Court." There having been a great number of ways of objecting to the jurisdiction of the Lord Mayor's Court in that Court itself, this Act, having for its object the regulation of the procedure of that Court, says you shall take the objection in that Court by plea. That seems to me to give an intelligible meaning to the section, and makes the whole Act consistent; and were it not for the decisions on the subject, I should have thought the case a very plain one. With great deference to the very learned Judge who decided otherwise, I must say that, having read on more occasions than one his judgment, I still remain of the same opinion. That, however, does not entitle me so to decide, if the decisions are of such a character as to compel me to follow them, even though my own opinion is clearly the other way. It is, therefore, necessary for me to examine those decisions.

The decision upon which the whole matter turns was that in *Manning* v. *Farquharson* (1). Mr. Justice *Crompton*, who decided that case, had not the benefit of that full discussion of the subject which has since taken place, and he did not take the view which has since been taken as to the effect of that section. He did not consider that the 15th section applied to a Defendant only, and did not apply to any one else; he considered that the jurisdiction of the Mayor's Court was enlarged by implication, not that the Defendant alone was prevented from obtaining prohibition. He says this: "The old law as to there being no jurisdiction unless the matter arose within the limits of the jurisdiction of the inferior Court, is, in my opinion, altered by the new Act of Parliament. And I think that the section in question, pleading or practice rule, or whatever it be, does in effect give the Lord Mayor's Court jurisdiction, whether the Defendant plead to the jurisdiction or not." If that was the sole ground of the decision, it is directly contrary to the decision of the House of Lords in the *Mayor of London* v. *Cox* (2), where, however, the writ was moved for, not by the Defendant in the action, but by a garnishee. The same learned Judge, Mr. Justice *Crompton*, delivered the judgment of the Court of Exchequer Chamber (3) in that case, and

(1) 30 L. J. (Q.B.) 22. (2) Law Rep. 2 H. L. 239.
(3) 2 H. & C. 401, 409.

speaking for the Court, deliberately expressed his approval of the decision in *Manning* v. *Farquharson* (1). I need hardly say that if that decision, having been so approved of, had not been touched by subsequent decisions, I should have felt myself bound to follow it. There is, it is true, a case of *Baker* v. *Clark* (2), in which, in 1873, the Court of Common Pleas appears to have followed the decision in *Manning* v. *Farquharson;* but, on the other hand, in a still more recent case of *Quartly* v. *Timmins* (3), Mr. Justice *Keating* says of *Manning* v. *Farquharson:* "That case occurred long before the decision in *Mayor of London* v. *Cox* (4). There have been numerous applications for prohibitions since by strangers: see *Cook* v. *Gill*" (5).

I am told that the practice of the Court of Common Pleas is to grant prohibitions to attorneys in their own names.

Now, if the view taken by Mr. Justice *Crompton* were correct; if it were really the meaning of the statute that the Defendant, as was said by him, was not entitled to prevent the action going on unless he pleaded, it would be a mere subterfuge and evasion to allow the Defendant's attorneys, simply by appearing in their own names, to stop the action by means of such prohibition, although the Defendant, for whom they appeared in the action, had not pleaded. I cannot attribute to the Court the notion that persons are entitled to evade an Act of Parliament in that way; and I therefore consider that the Court of Common Pleas allowed such a practice to spring up and continue with their approval because they entirely disapproved of the decision in *Manning* v. *Farquharson.*

I now come to the decision of the House of Lords in *Mayor of London* v. *Cox,* which shewed clearly that the jurisdiction of the Lord Mayor's Court was not enlarged, so as to have either a general jurisdiction or so as to have even a special jurisdiction as regards the Defendant in an action who did not plead, if anybody else but the Defendant interfered. That decision, therefore, so far destroyed the effect of the judgment of Mr. Justice *Crompton* as to shew that it was not right to say that the jurisdiction was

(1) 30 L. J. (Q.B.) 22. 6 Jur. N.S. 1360 (3) Law Rep. 9 C. P. 416.
(2) Law Rep. 8 C. P. 121. (4) Ibid. 2 H. L. 239.
(5) Law Rep. 8 C. P. 107.

M. R. 1875 JACOBS v. BRETT.

extended in the case where the Defendant did not plead; but it did not in express terms overrule *Manning* v. *Farquharson* (1), because it was not necessary to do so. However, the opinion of the Judges being asked, that opinion was given in a very elaborate form by Mr. Justice *Willes*, speaking on behalf of all the learned Judges; and I must say it does appear to me to express, although in a very careful and guarded manner, disapproval of the decision in *Manning* v. *Farquharson*. The words used are these (2): "The only section in the Act which requires separate attention is the 15th, by which 'no Defendant shall be permitted to object to the jurisdiction of the Court by any proceeding whatsoever, except by plea.' This section, however, does not preclude the application for a prohibition by the garnishee, who throughout the custom and the Act, is recognised as distinct from the Defendant. Indeed, it may be doubted whether the attention of the Legislature was called to the indirect effect attributed"—that word is remarkable, and would hardly have been used if the Judges had thought that the effect was rightly attributed—"to that section in *Manning* v. *Farquharson*, of taking away from the Defendant in the Lord Mayor's Court the right of moving for a prohibition because of want of jurisdiction. If the matter were *res nova*, it might be thought that the section only took away from the Defendant proceedings which he individually possessed the right to take as suitor or party aggrieved, such as arrest of judgment, error, or action, and not prohibition, to which not only he, but the Crown, or any subject, even the Plaintiff, might have resorted. It is, however, unnecessary to criticise the opinion of *Crompton*, J., in *Manning* v. *Farquharson*, because, as explained by that very learned Judge in his judgment in this case when in the Exchequer Chamber, it does not affect the garnishee."

If I understand those sentences, they mean this, that if the matter were *res nova* the Judges' opinion would be exactly the other way; that if the case of *Manning* v. *Farquharson* were out of the way, their opinion was that the real effect of the Act of Parliament was not to take away the right of the Defendant as a suitor in the Mayor's Court—an opinion which I have already stated is my own. Looking at the case in that way, it appears to me I am right in

(1) 30 L. J. (Q.B.) 22. (2) Law Rep. 2 H. L. 259.

M. R.
1875
JACOBS
v.
BRETT.

saying that the learned Judges were unanimously of opinion that the judgment in *Manning* v. *Farquharson* (1) could not be supported; and being fortified by that expression of opinion, I think I am at liberty to say that I am entitled to disregard the effect of that judgment, and say it is not binding upon me.

The same remark would apply with still greater force to the case of *Baker* v. *Clark* (2), in which there was merely an intimation by the Court that the prohibition had better be taken out in the name of a stranger, which was accordingly done the next day; and, as I said before, one of the Judges who decided that case has since expressed an opinion anything but favourable to *Manning* v. *Farquharson*.

I am therefore of opinion that, not being bound by that decision, the *Mayor's Court Procedure Act* does not prevent the Defendant from moving in prohibition; consequently, that the writ of prohibition has been rightly issued in this case, and the application must be refused with costs.

Solicitors for the Defendant: Messrs. *Raven & Hare.*

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## COMMINS *v.* SCOTT.

M. R.
1875
*April* 16.

[1875 C. 87.]

*Sale of Real Estate—Memorandum of Agreement—Description of Contracting Parties—Statute of Frauds.*

An agreement for the sale of real estate did not disclose the names of the vendors, but it appeared therefrom that the vendors were a company in possession of the property offered for sale, and that they had carried on operations thereon:—

*Held*, on demurrer, that the vendors were sufficiently described to satisfy the *Statute of Frauds*.

THIS was a demurrer to a bill filed by *Thomas Commins, William Phillips, Mary Margaret Russell, Thomas Julyan, William Yates, Nanny McMeikan, Hugh Biddick, Nehemiah Stevens, William Pearce,* and the Rev. *James Young*, as Plaintiffs, against *Sack Noy Scott* and *Richard Daniel Warne*, as Defendants.

(1) 30 L. J. (Q.B.) 22. (2) Law Rep. 8 C. P. 121.

M. R. 1875 COMMINS v. SCOTT.

The bill contained allegations to the following effect :—

On the 25th of September, 1874, the Plaintiffs being, as they had ever since continued to be, possessed of certain clayworks in *Cornwall*, held under certain leases, setts, or grants, caused the same to be put up for sale by public auction, according to certain printed particulars and conditions. No sale, however, then took place.

On the 26th of September an interview took place between Mr. *William Philp*, the agent of the Plaintiffs, and the Defendant *Sack Noy Scott*, at which it was agreed that the Defendants should purchase the property for £800, subject to the conditions of sale. A memorandum of the agreement was written upon a copy of the conditions of sale, and was signed by *Scott* on his own behalf and as agent for his co-Defendant, and by *Edward Commins*, the solicitor of the Plaintiffs, as their agent. The memorandum was as follows :—

"We, *Sack Noy Scott* and *Richard D. Warne*, both of *St. Austell*, in the county of *Cornwall*, do hereby acknowledge that I have this day purchased the property mentioned in the particulars hereunto annexed marked (A), for the sum of eight hundred pounds, and have paid into the hands of Mr. *William Philp* the sum of one hundred pounds as a deposit, and in part payment; And we do hereby agree to pay the remaining sum of seven hundred pounds at the office of Mr. *Edward Commins* at *Bodmin*, pursuant to the foregoing conditions, which in all respects we hereby agree to fulfil. Witness our hand the 26th day of September, 1874.

| | | | | | | | |
|---|---|---|---|---|---|---|---|
| "Deposit . | £100 | 0 | 0 | Purchase-money | £800 | 0 | 0 |
| "Contract . | 4 | 4 | 6 | Deposit . . . | 100 | 0 | 0 |
| "Auctioneer | 12 | 0 | 0 | | | | |
| | £116 | 4 | 6 | Remains unpaid | £700 | 0 | 0 |

"*S. N. Scott.*

"As agent for the vendors, I hereby confirm this sale.

"*Edward Commins*, Solicitor, *Bodmin.*"

Neither the particulars nor the conditions of sale disclosed the names of the vendors. The material portions of the conditions of sale were as follows :—

"Conditions of an auction held on the 25th day of September,

1874, at the *Queen's Head Hotel*, in *St. Austell*, by Messrs. *Philp & Co.*, auctioneers, for selling in one lot all the interest of the company of and in the leases and water grants under which its operations within and upon the *Whitborough Tor*, otherwise *Gazeland Clay Works*, situate in the parish of *St. Neot*, in the said county, mentioned and comprised in the printed particulars hereunto annexed, marked with the letter 'A,' have been carried on (excepting the clay now washed, and the horses, waggons, carts, and other carrying plant)."

"Fourth. The purchaser shall, immediately after the sale, pay to Mr. *William Philp*, the auctioneer holding the sale, a deposit of £25 per centum on his purchase-money, and shall sign an agreement for paying and shall pay the remainder of his purchase-money to the said Mr. *Edward Commins*, at his office in *Bodmin*, on or before the 25th day of December next, between the hours of ten o'clock in the forenoon and two o'clock in the afternoon, and if the same is not so paid, then such purchaser is to pay interest on his purchase-money at the rate of £5 per centum per annum from the said 25th day of December to the day on which the same is actually paid. Upon payment by the purchaser of his purchase-money in manner aforesaid, the purchaser is to be entitled to possession of the property purchased by him, or to the rents and profits thereof, as from the said 25th day of December next, down to which time all outgoings are to be paid by the vendors, and such rents and outgoings shall, if necessary, be apportioned between the vendors and purchaser for the purposes of this condition; and no purchaser shall be entitled to the possession of the clay sett or land, or to remove or take away any of the property purchased hereunder until the whole of the purchase-money shall have been fully paid and satisfied.

"Fifth. If and so long as any property shall be left in possession of the vendors in consequence of the full amount of the purchase-money not having been paid at the time appointed, or from any other cause, the purchaser shall bear and repay all costs and expenses incurred by him in keeping possession of such property from the day of sale until the completion of the purchase thereof, and shall take all risk in relation to such property in the event of the same or any parts thereof being stolen, destroyed, or

M. R. 1875 COMMINS v. SCOTT.

damaged, or of any injury or accident happening thereto respectively, and shall notwithstanding pay the full amount of his purchase-money, with all costs and expenses (if any), and whether in respect of the keeping possession of the property purchased or otherwise, at the time and place hereinbefore mentioned, to the vendors, who shall be entitled, in case of default made in such payment, to sue for the same as and for liquidated damages, but without prejudice to any other condition or remedy.

"Sixth. The leases, setts, or grants under which the operations of the said company have been carried on are respectively:—[Then followed particulars of the leases.]

"Seventh. The said indentures shall be conclusive evidence of the grantors' titles, and the purchaser of the interest of the said company thereunder shall be precluded from requiring any evidence of the grantors', or any title prior to the said indentures.

"Eighth. The interests of the said company in the said indentures is sold subject to the rents, royalties, dues, covenants, and conditions therein reserved and contained to the same respectively, being duly paid, observed, and performed by the purchaser, his executors, administrators, or assigns, of such interest from the said 25th day of December next, during the remainder of the terms demised by such indentures.

"Ninth. No abstract of title in respect of the interest of the said company in the property sold will be furnished to the purchaser, except at his costs and request in writing, addressed to the said Mr. *Edward Commins*, and left at his office in *Bodmin* aforesaid, within seven days after notice shall have been delivered by the purchaser, or his solicitor, if any, and all costs and expenses of and incident to the production, inspection, and examination, and of making and furnishing abstracts or copies of or extracts from the said indenture, or otherwise in relation thereto, shall be borne and paid by the purchaser, who shall not be entitled to require an abstract or copy of or extract from any deed or document not in the possession of the vendors."

"Twelfth. Upon payment, as aforesaid, of the purchase-money in respect of the property, an assignment of the interest of the company therein to the purchaser will be executed, such assignment to be prepared by the said Mr. *Edward Commins*, at the expense

of the purchaser, at the following rate:—£5 5*s.* for the first £100 of his or her purchase-money, and £1 1*s.* for every succeeding £100 or fractional part of £100, exclusive of stamps and parchment, but such assignment, and every other assignment and act (if any), which shall be required by such purchaser for completing or perfecting the title or assignment, or for any other purpose, shall be prepared, made, and done by and at the expense of such purchaser by the said Mr. *Edward Commins.*"

The Defendant *Scott* handed to *Philp* his cheque for £116 4*s.* 6*d.*, but this cheque was dishonoured on the 2nd of October, 1874, and the Defendants afterwards refused to complete the contract. The bill, which prayed for specific performance of the agreement, was not filed until the 10th of March, 1875, and various matters were stated in it tending to account for the delay.

The Defendants demurred.

It was agreed that the case should be argued as if the bill contained allegations to the effect that the Plaintiffs were a company who had carried on operations on the property offered for sale, and were in possession thereof.

Mr. *Marten*, Q.C. (Mr. *Kekewich* with him), for the demurrer, submitted that the agreement did not shew sufficiently who the vendors were, and consequently that there could be no decree for specific performance: *Potter* v. *Duffield* (1).

Mr. *Chitty*, Q.C., and Mr. *Bevir*, for the Plaintiffs:—

First. The vendors are the persons who employed *Edward Commins* as their agent, and that is a sufficient description. This does not conflict with *Potter* v. *Duffield*, which was really decided on the evidence and not on the point of law. The point for which we contend was decided in *Morris* v. *Wilson* (2), a case which was not cited in *Potter* v. *Duffield*, and is in accordance with the principles laid down in *Benjamin* on Sales (3), *Trueman* v. *Loder* (4), *Newell* v. *Radford* (5), and *Calder* v. *Dobell* (6).

[The MASTER OF THE ROLLS:—There can be no doubt that if a

(1) Law Rep. 18 Eq. 4.
(2) 5 Jur. (N.S.) 168.
(3) 1st Ed. p. 164.
(4) 11 A. & E. 589.
(5) Law Rep. 3 C. P. 52.
(6) Ibid. 6 C. P. 486.

M. R. 1875 COMMINS v. SCOTT.

written contract is made in this form, "*A. B.* agrees to sell *Blackacre* to *C. D.* for £1000," then *E. F.*, the principal of *A. B.*, can sue *G. H.*, the principal of *C. D.*, on that contract; and *Morris* v. *Wilson* (1) appears to have been decided on that principle. But in the case supposed there is a memorandum of the agreement in writing sufficient to satisfy the *Statute of Frauds*—here that is the very question. It seems to me that on the point which you are now arguing the present case is undistinguishable from *Potter* v. *Duffield* (2), and I see no reason to alter the opinion I expressed in that case.]

Secondly. It appears from the conditions of sale that the vendors are a company who are in possession of the property offered for sale, and have carried on operations there. That is as good a description as "proprietor," which has been held to be sufficient: *Sale* v. *Lambert* (3).

Mr. *Marten*, in reply, as to the construction of the conditions of sale.

SIR G. JESSEL, M.R.:—

The question in this case is, is there a contract? Now, in order that there may be a contract, at least two things are necessary, namely, contracting parties, and subject-matter of a contract. No doubt other things are necessary, such as proper words of contract; but at all events, those two things there must be.

No doubt arises in this case as to the subject-matter of the contract: the only question is, whether the written memorandum of agreement contains a sufficient description of the parties to the contract. Now the Court ought to be careful not to manufacture descriptions, or to be astute to discover descriptions which a jury could not identify; for, as I understand it, at law that would be a question for the jury.

Upon this memorandum it appears, in the first place, that the vendors employed *Edward Commins* as their agent, and that he was their solicitor, but the conditions shew a great deal more than that. They shew that the vendors are in possession. That, I think,

(1) 5 Jur. (N.S.) 168. (2) Law Rep. 18 Eq. 4.
(3) Law Rep. 18 Eq. 1.

M. R.
1875
COMMINS
v.
SCOTT.

is the fair inference from the fifth condition. They also shew that what is to be sold are the interests of a company in property on which the company has been carrying on operations. That appears from the 6th, 7th, and 8th conditions. It may be said that the vendors may be mortgagees of the company, who are in possession; but I do not think that is the reasonable and natural inference from the language of the conditions, and particularly the language of the 9th and 12th conditions. A mortgagee would furnish an abstract, not of the company's interest, but of his own title; and what he would convey would be, not the interest of the company, but the property in which the company had an interest.

In my opinion, the only fair inference from these conditions is, that the vendors are a company in possession of the property, who have been carrying on operations there; it is admitted that the Plaintiffs are such a company; and I am of opinion, therefore, that there is a good contract.

I overrule the demurrer; but having regard to the way in which it has been argued as a question of substance and not as a question of form, and having regard also to the nature of the allegations which are introduced to account for the delay, in which I observe a singular absence of dates, I think the justice of the case will be met by making the costs costs in the cause.

Solicitors: Messrs. *Gregory, Rowcliffes, & Rawle;* Messrs. *Coode, Kingdon, & Cotton.*

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## *In re* MORLEY.

M. R.
1875
*April* 17.

*Costs—Taxation—Chancery or Parliamentary Scale—Tramways Act*, 1870 (33 & 34 *Vict. c.* 78)—*Provisional Order of Board of Trade.*

The costs of applications to the Board of Trade for provisional orders under the *Tramways Act*, 1870, are to be taxed on the Chancery and not on the Parliamentary scale.

MESSRS. *MORLEY & SHIRREFF* had been professionally employed in an application to the Board of Trade for a provisional order under the *Tramways Act*, 1870, for the construction of a tram-

M. R. 1875 *In re* Morley.

way from *Ipswich* to *Felixstowe*. The provisional order was made, and was, along with other orders of a like nature, confirmed by the *Tramways Orders Confirmation Act*, 1873 (36 & 37 Vict. c. cxcvii).

Upon the taxation of Messrs. *Morley & Shirreff's* bills of costs relating to the application, the Taxing Master held that they must be taxed upon the Chancery and not upon the Parliamentary scale. A summons was taken out to review the decision, and now came on to be heard.

Mr. *Chitty*, Q.C., and Mr. *Graham Hastings*, for the summons, contended that the application to the Board of Trade was in the nature of a Parliamentary proceeding. The action of the Board of Trade was a mere substitute for the inquiry before a Committee of one of the Houses of Parliament. The order was of no value unless it was confirmed by Act of Parliament; and although the bill to confirm the order was brought in by the Government, still if any opposition was raised, the further conduct of the proceedings was left to the promoters, whose Parliamentary agents were consequently compelled to watch the progress of the bill.

Mr. *Roxburgh*, Q.C., for the promoters, was not called upon.

Sir G. Jessel, M.R. :—

I am of opinion that the Taxing Master has taken a correct view of the matter, and that these are not Parliamentary costs at all. The Legislature, instead of allowing proceedings to be taken before a Committee of either House, or a joint Committee of both Houses of Parliament, decided that these inquiries might be prosecuted more cheaply and more beneficially before a local tribunal, or persons appointed to inquire into the matters locally. These proceedings are instituted, and the parties, instead of applying to Parliament, apply to the Board of Trade; and after making a proper investigation in the locality, the Board of Trade makes a provisional order; and then, if Parliament sees fit, that provisional order, generally with a great many more, is confirmed by an Act of Parliament, which is not procured at all by the applicants but by the Board of Trade, that is, by the Executive Government of the

country. The result is that there has been an entire change of system, and all that the applicant obtains is the provisional order, and there is no proceeding in Parliament with which he really has anything to do directly. These, therefore, are not Parliamentary costs; they are simply costs of obtaining an order from the Board of Trade, and they must be taxed under the ordinary rules applicable to costs. I think, therefore, that these costs have been rightly taxed. I may add that I think there is a reason for this. In former days, when applications had to be made to Parliament, great expenses were incurred in consequence of the necessity of employing Parliamentary agents, and so on; but on these local inquiries there is no necessity for anything of the kind; you may employ an ordinary solicitor, and the notices may be served in the ordinary way, and no great expenditure is incurred. It is quite true, under the old system, more was given for serving the local notices and attending local inquiries, because it was considered that the mere remuneration for attending before the committee was not sufficient; that is, there was a higher scale throughout. But now, when there is no attendance before the committees, there is no excuse for the higher scale with regard to the local inquiries. Therefore it appears to me that the reason of the thing agrees with the literal view of the subject, as to which there can be no dispute, namely, that these are not Parliamentary costs at all, and therefore I refuse this application with costs.

Solicitors: Messrs. *Morley & Shirreff;* Messrs. *Scott, Jarmain, & Co.*

M. R.
1875
*March* 11;
*April* 17.

## LEES *v.* COULTON.

[1873 L. 63.]

## LEES *v.* CLUTTON.

[1875 L. 18.]

*Partition Suit—Immediate Decree for Sale—Parties declared Trustees—Interests of Unborn Issue—Form of Declaration—Trustee Act,* 1850 (13 *&* 14 *Vict. c.* 60), *s.* 30—*Partition Act,* 1868 (31 *&* 32 *Vict. c.* 40), *s.* 7.

Where real estate was held by a complicated title under which the parties interested were very numerous and unborn issue might become entitled to legal estates :—

*Held,* that all persons in existence who were interested in the estate being parties to a suit for partition, and the title being proved at the hearing, an immediate decree for sale might be made without any preliminary inquiry ; that a declaration might be made that the parties to the suit were, and that unborn issue upon coming into existence would be, trustees of their shares and interests within the meaning of the *Trustee Act,* 1850 ; but that the appointment of a new trustee, and consequent vesting order, ought to be the subject of a subsequent application, and ought not to be made by the decree.

*JOSEPH LEES* (who died in 1826) and his brother *James Lees* (who died in 1828) were the purchasers of divers estates of very great value in the counties of *Lancaster* and *York,* and these estates were conveyed to them as tenants in common. *Joseph Lees* by his will settled his shares of these estates, and under the limitations of that will unborn issue might become entitled to legal estates therein.

The persons now interested in the estates were very numerous, and their titles very complicated. In 1873 the suit of *Lees* v. *Coulton* was instituted for the purpose of obtaining a decree for sale under the *Partition Act,* 1868. By a decree made on the 30th of March, 1874, it was declared that, subject to the interests of unborn issue, the Plaintiffs and Defendants in the suit were entitled to the hereditaments which was the subject thereof; and it was ordered that such hereditaments should be sold.

After this decree had been made, and before it was acted upon, it was discovered that other persons than the Plaintiffs and Defendants were interested in the property, and the suit of *Lees* v. *Clutton*

was instituted for the purpose of obtaining the necessary variation in the decree, and bringing all parties now ascertained to be interested before the Court. A petition for rehearing *Lees* v. *Coulton* was presented, and came on at the same time with *Lees* v. *Clutton*.

Mr. *Waller*, Q.C., and Mr. *Bunting*, for the Plaintiffs, said that all parties interested were now before the Court, and the title proved by affidavit, and asked that an immediate decree for sale might be made in both suits without any preliminary inquiry as to parties; that under the 7th section of the *Partition Act*, 1868, and the 30th section of the *Trustee Act*, 1850, it might be declared that the parties to the suit were, and that unborn issue upon coming into existence would be, trustees of their respective interests within the meaning of the Trustee Acts; and that a new trustee might be appointed in their place and a vesting order made; citing *Shepherd* v. *Churchill* (1).

Mr. *Hamilton Humphreys*, Mr. *Vaughan Hawkins*, and Mr. *Bardswell*, for the Defendants.

The MASTER OF THE ROLLS said that as the title had been proved at great expense, an immediate decree for sale would be made; and that there would be a declaration that the parties to the suit were, and that unborn issue upon coming into existence would be, trustees of their respective interests; but that, as they could only be constituted trustees by the order, it seemed to him to be going too far to appoint a new trustee in their place at once; and that it would be better to make an application for that purpose after the order was drawn up.

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April 17. The minutes as prepared on behalf of the Plaintiffs contained a declaration in the following form:—

"Declare that the several parties to this cause are trustees within the meaning of the *Trustee Act*, 1850, of their respective shares and interests in the several estates hereby directed to be sold, and that the interests in such several estates of

(1) 25 Beav. 21.

M. R. 1875 LEES v. COULTON. LEES v. CLUTTON.

all unborn persons who might claim under the will of *Joseph Lees*, the father, in the said bill named, are the interests of persons who, upon coming into existence, will be trustees within the meaning of the said Act."

The Registrar took the objection that the declaration ought to run that the parties and unborn issue would be trustees upon the sale or after the payment of the purchase-money: *Seton* on Decrees (1).

The causes were now spoken to on this point.

The MASTER OF THE ROLLS made the declaration in the above terms.

Solicitors: Messrs. *Johnson & Weatheralls;* Messrs. *Fearon & Co.;* Messrs. *Learoyd & Learoyd;* Messrs. *Burton, Yeates, & Hart.*

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M. R. 1875 *April* 19, 20.

## MOTT *v.* SHOOLBRED.

[1871 M. 43.]

*Nuisance—Injunction—Improper User of Public Street—Suit by Reversioner—Right to sue.*

Where a public street was improperly used as a stable-yard:—
*Held*, that the nuisance to the neighbouring houses was not so permanent as to entitle a reversioner to an injunction.

THE Plaintiff was entitled to two houses, Nos. 5 and 6, *University Street*, in the parish of *St. Pancras*, for the unexpired residue of a term of ninety-one years from Lady Day, 1812. He had demised No. 5 for the term of twenty-one years from the 29th of September, 1870, determinable at the option of lessor or lessee at the expiration of the seventh or fourteenth year; and he had demised No. 6 for a term of seven years from the 29th of September, 1870. The houses were in the occupation of the tenants under these demises.

The Defendants were the members of the firm of *James Shoolbred & Co.*, carrying on an extensive business as drapers, hosiers, silk mercers, carpet warehousemen, and upholsterers, at premises

(1) Pages 799, 801; Forms 27, 32.

in *Tottenham Court Road* and *Grafton Street*, and near *University Street*. They had recently acquired and pulled down five houses, Nos. 35 to 39, *University Street*, immediately opposite the Plaintiff's houses, and had erected on the site a pile of new buildings very considerably higher than the old houses. These new buildings were intended to be used for warehousing and selling household furniture, which was to be carried into and out of the building by an entrance opposite the Plaintiff's houses.

The bill alleged that the Defendants' carts and vans, which were very numerous and of great size, were kept constantly standing in *University Street*, opposite the Plaintiff's houses, so as to block up the street and, in fact, convert it into a stable-yard in connection with the new buildings, and so as to be a nuisance to the Plaintiff and the tenants and occupiers of his houses. It also alleged that the new buildings obstructed the access of light to the windows of the Plaintiff's houses; and it prayed for injunctions to restrain such nuisance and obstruction of light.

The cause now came on to be heard. This report is confined to the question of the nuisance alleged to be caused by the Defendants' use of *University Street*.

Mr. *Fry*, Q.C., and Mr. *Field*, for the Plaintiff:—

It is quite clear that the Defendants are using the street in an unlawful and unreasonable manner: *Benjamin* v. *Storr* (1). The Plaintiff's property is deteriorated in value, and the nuisance is likely to be permanent; consequently the Plaintiff is entitled to sue in respect of the damage to his reversion: *Kidgill* v. *Moor* (2); *Bell* v. *Midland Railway Company* (3). In *Clowes* v. *Staffordshire Potteries Waterworks Company* (4), the Defendants had constructed a reservoir, from which muddy water was discharged into a stream on the banks of which some dye-works had been erected. The works were let, and the Plaintiff was the reversioner; and the Court held that he was entitled to an injunction, the reservoir being a permanent work used in a way to create a nuisance. Here there is a permanent building, intended to be permanently used as a furniture warehouse; it is now used so as to be a nuisance to the

(1) Law Rep. 9 C. P. 400.
(2) 9 C. B. 364.
(3) 10 C. B. (N.S.) 287.
(4) Law Rep. 8 Ch. 125.

M. R. 1875 MOTT v. SHOOLBRED.

Plaintiff: there exist therefore all the elements which existed in *Clowes* v. *Staffordshire Potteries Waterworks Company* (1). The result of the continuance of the nuisance will clearly be to depreciate the value of the property and drive away tenants; that is an injury which the law recognises: *Jesser* v. *Gifford* (2). It is quite clear that a reversioner may sue in respect of an obstruction of light: why may he not sue in respect of such a nuisance as is now complained of?

Mr. *Benjamin*, Q.C., Mr. *Speed*, and Mr. *Oppenheim*, for the Defendants, were not called upon as to this point.

SIR G. JESSEL, M.R., said that if the tenants of the houses were now complaining there could be no answer to the case; but he was of opinion that the injury was not of such a permanent character as to entitle a reversioner to sue. The case was totally different from one in which obstruction of light was complained of; for in such cases there was an injury to the right, which might be lost if the reversioner were not able to institute proceedings. Here what was complained of was a nuisance in a public street, which no length of time could legalise. The cases of *Mumford* v. *Oxford, Worcester, and Wolverhampton Railway Company* (3) and *Simpson* v. *Savage* (4) shewed that, to entitle a reversioner to maintain an action, the injury must be necessarily of a permanent character, and that a presumed intention to continue the nuisance was not sufficient, even where there was evidence that the premises would sell for less if the nuisance were continued. No relief could, therefore, be given in respect of the nuisance caused by the Defendants' use of *University Street*. As to the obstruction of light there would be an inquiry as to damages. The Defendants must pay the costs of the suit, except such costs as related to the claim in respect of nuisance, which must be borne by the Plaintiff.

Solicitors: Messrs. *Field, Roscoe, & Co.*; Messrs. *Wild, Barber, & Browne.*

(1) Law Rep. 8 Ch. 125.
(2) 4 Burr. 2141.
(3) 1 H. & N. 34; 25 L. J. (Ex.) 265.
(4) 1 C. B. (N.S.) 347; 26 L. J. (C.P.) 50.

3 Jur. N.S. 161.

## ROBINSON *v.* ASHTON.

[1873 R. 110.]

## ASHTON *v.* ROBINSON.

[1873 A. 90.]

M. R.
1875
*April* 20.

*Partnership—Profits—Capital—Assets—Rise in Value of Mill and fixed Plant.*

On the formation of a partnership it was agreed that the business should be carried on at a mill belonging to *R.*, one of the partners; and *R.* was credited in the books of the partnership with the value of the mill. From time to time sums were expended in making additions to and improvements in the mill; and in the yearly balance-sheets the mill was entered at the original value, increased by the amount so expended, but less a certain amount for depreciation; and the partners were allowed interest on the sums from time to time standing to their capital accounts:—

*Held*, that in the absence of any special agreement the mill was an asset of the partnership, and that on a sale of the business, under which the purchase-money of the mill was largely in excess of its value in the books, the difference was profit divisible in the proportions in which the profits of the business were divisible at the time of the sale.

THESE were two suits instituted for the purpose of winding up the affairs of a partnership which formerly subsisted between *John Robinson* and *John Ashton*.

In 1861, *John Robinson*, his son *William Hayne Robinson*, and *John Ashton*, entered into partnership for seven years as cotton spinners. The terms of the partnership were not reduced to writing.

Previously to the commencement of this partnership *John Robinson* was the owner (subject to a mortgage for £10,000) of a cotton mill at *Oldham* and fixed plant and machinery; and it was agreed that the partnership business should be carried on at this mill. A valuation of the mill and fixed plant and machinery was made, and the value thereof (less the mortgage debt) ascertained to be £24,000; and this amount was entered in the books of the partnership as the capital of *John Robinson*. *W. H. Robinson* brought in no capital; *Ashton* brought in £2500 cash as his capital.

*John Robinson* took one-half of the profits, and *W. H. Robinson*

M. R. 1875 ROBINSON v. ASHTON. ASHTON v. ROBINSON.

and *Ashton* each one-fourth, and in the accounts any undrawn profits were carried to the capital account of the partner to whom they belonged, and interest was allowed on the capital standing to such account.

During this partnership the mill was enlarged and improved, and other lands were acquired and new buildings erected at very considerable expense, all of which was borne by the partnership and paid out of the proceeds of the business.

This partnership came to an end on the 31st of December, 1867, and thereupon a second partnership, being a partnership at will, was entered into by *J. Robinson*, *W. H. Robinson*, and *Ashton*. The capital appearing to the credit of each partner at the termination of the first partnership became his capital in the second partnership, and, along with the undrawn profits, bore interest as before. The profits were divided between the partners equally. The terms of this partnership were never reduced to writing.

The second partnership continued down to the 2nd of March, 1871, when *W. H. Robinson* died, having by his will appointed *J. Robinson* sole executor, and made him sole devisee and legatee of his real and personal estate.

Upon the death of *W. H. Robinson* it was verbally agreed between *J. Robinson* and *Ashton* that the business should be carried on till the 1st of January, 1872, upon the terms of the second partnership, *J. Robinson* taking his son's place and share of capital and profits, and that from the 1st of January, 1872, *Robinson* and *Ashton* should share the profits equally. This agreement was carried into effect, and the sums standing to the credit of *J. Robinson* and *Ashton* respectively on the 1st of January, 1872, were carried to their capital accounts in the third partnership, and, along with any undrawn profits, bore interest as before. The terms of this partnership were never reduced to writing.

Throughout the three partnerships *Robinson's* capital was much larger than *Ashton's*.

In 1873 the mill, plant, and machinery, and the goodwill of the business, were sold by *Robinson* and *Ashton* to a limited company. By the terms of the agreement for sale (in which *Robinson* and *Ashton* were both described as vendors), separate prices were fixed

for the mill and fixed plant, and for the moveable plant and goodwill, viz., £57,052 for the former, and £48,744 12*s.* for the latter.

The main question in the suits (which now came on to be heard together) was, whether *Ashton* was entitled to one half of the profit which had arisen from the sale of the mill and fixed plant.

Throughout the three partnerships the mill and fixed plant were entered in the books at the original value of £24,000, increased from time to time by the sums expended in repairs and improvements, but less a certain sum each year in respect of depreciation. No valuation of the property was made between 1861 and the sale, and under the date the 1st of January, 1872, the mill and fixed plant were entered in the books of the third partnership at the value arrived at in manner just mentioned, which was much less than the selling price.

Mr. *Cotton*, Q.C., Mr. *Marten*, Q.C., and Mr. *W. F. Robinson*, for *J. Robinson*:—

We submit that *Ashton* was only entitled to share in the working profits made while the partnership was a going concern, and that he had no interest in the mill and fixed plant, which could not be sold without winding up the business. The sum of £24,000 entered in the books as *Robinson's* original capital was fixed upon in order to determine what rent should be paid by the partnership for the mill and fixed plant, which were never intended to become partnership property; and the rent so fixed was paid by the allowance of interest to *Robinson* in the partnership books. At the death of *W. H. Robinson*, in 1871, the value of the mill and fixed plant had materially increased, and, as representing his son, *J. Robinson* would have been entitled to one-third share of such increased value if *Ashton's* contention be correct; but no fresh valuation of the property was made, and consequently that share will be lost to *J. Robinson* if *Ashton* succeeds. In the absence of writing that is a strong circumstance to shew the intention of the parties; and our contention is supported by the circumstance that when the property came to be sold, separate prices were put on the mill and fixed plant, and on the moveable plant and goodwill.

M. R.
1875
ROBINSON
v.
ASHTON.

ASHTON
v.
ROBINSON.

Mr. *Fry*, Q.C., and Mr. *Hemming*, for *Ashton*, were not called upon.

Mr. *W. B. Heath*, for third parties.

SIR G. JESSEL, M.R., said that in the absence of special agreement the rise or fall in value of fixed plant or real estate belonging to a partnership was as much profit or loss of the partnership as anything else. If a man said "I bring in no money capital—I have not got money, but here is a mill and machinery worth £20,000 which I bring in," and he was credited in the books with £20,000—then the mill and machinery became partnership property just as much as if the partner had brought in money, and the partnership had with that money bought the mill and machinery. It was suggested that the mill and machinery were *Robinson's*, and that the partnership had only paid rent for them; but tenants did not generally lay out money on their landlords' property, especially under circumstances such as those of the present case. There must be a declaration that *Ashton* was entitled to one-half of the proceeds of sale after payment thereout of the debts of the partnership and the capital appearing by the books to be due to each partner.

Solicitors: Messrs. *Gregory, Rowcliffes, & Rawle*, agents for Messrs. *Ascroft & Sons, Oldham;* Messrs. *Chester, Urquhart, & Co.*, agents for Mr. *John Ponsonby, Oldham;* Messrs. *Phelps & Sidgwick.*

## MIDDLETON *v.* POLLOCK.

[1873 M. 204.]

## *Ex parte* NUGEE.

M. R.
1875
*April* 24.

*Equitable Set-off—Debts "En autre Droit"—Debts due to and from Executor and Residuary Legatee—Assignment after Decree.*

*N.* and *C.* were executors of a will and trustees of the residuary real and personal estate of a testator who died in 1859. *N.* and *F.* were tenants for life of the residuary estate in equal shares. In January, 1873, *C.* was residing abroad, and *N.*, being about also to go abroad, gave to *P.* (the solicitor of the executors and trustees) an authority on behalf of both trustees to receive the rents of the real estate and pay the outgoings. Under this authority *P.* received the rents; and at his death a considerable sum was due from him in respect thereof.

*P.*'s estate proved insolvent, and the usual creditor's decree was made for administration. Subsequently to the decree *F.* assigned to *N.* all *F.*'s interest in the sum due from *P.*

*N.* was indebted to *A* and *B.* as trustees for *P.* in a sum the repayment of which was secured by a mortgage of real estate belonging to *N.*: and this sum was paid into Court in the suit to a separate account, under an order made without prejudice to any question as to set-off. *N.* afterwards presented a Petition claiming to be entitled to set off the debt due from *P.* against the mortgage debt, and seeking to have the amount of the debt due from *P.* paid out of the fund standing to the separate account:—

*Held*, that as regards *F.*'s interest there could be no set-off, inasmuch as it was not assigned to *N.* until after the decree:

*Held*, also, that the debt due from *P.* being either due to both trustees and executors, or if due to *N.* alone, due to him in his character of trustee and executor, could not be set off against a debt due from him individually.

*Dicta* in *Cochrane* v. *Green* (1) disapproved of.

UNDER the will and codicils of Mr. *Francis James Nugee* (who died in 1859), the Rev. *George Nugee* and Mr. *Thomas Palmer Chapman* were trustees of the testator's residuary real and personal estate, which was very large, and produced an income of about £4700; and they were also the executors of the testator. The Rev. *George Nugee* and Mrs. *Field* were entitled to the income of the estate in equal moieties; and Mrs. *Field* was entitled to her share for her separate use.

In the beginning of 1873 Mr. *Chapman* was abroad, and Mr.

(1) 9 C. B. (N.S.) 448; 30 L. J. (C.P.) 97.

M. R. 1875 — MIDDLETON v. POLLOCK. — *Ex parte* NUGEE.

*George Nugee* was about to go abroad. Under these circumstances, on the 15th of January, 1873, Mr. *G. Nugee* wrote to Mr. *A. A. Pollock* (who was the solicitor of the trustees) a letter in the following terms:—

"As my co-executor, Mr. *Chapman*, is now abroad, and cannot sign the estate's cheques, I think it would be well for you, pending his return or the appointment of a new trustee, to meet the wants of the estate, the division of income, &c., with your cheques, so applying the moneys of the estate as they accrue from the rents, &c. I hereby give you my authority so to act on our behalf."

Under this authority Mr. *Pollock* received all income and paid all outgoings in respect of the real estate from the 15th of January, 1873, until his death on the 10th of August, 1873; and he from time to time made payments of the surplus income to Mr. *G. Nugee* and Mrs. *Field*. At the time of *Pollock's* death £2111 15*s.* 6*d.* was due from him in respect of surplus income received by him but not paid over to the parties entitled.

Mr. *Pollock's* estate proved insolvent, and the present suit was instituted on behalf of all his creditors for administration. On the 17th of September, 1873, the usual administration decree was made.

Mr. *G. Nugee* was at the death of *A. A. Pollock* indebted to Messrs. *Evans* and *Charles Pollock* in two sums, which with subsequent interest amounted to £4931 16*s.* 10*d.*, and the repayment of which was secured by a mortgage and deed of further charge. Messrs. *Evans* and *Charles Pollock* were trustees of the debt and securities for *A. A. Pollock*, who had advanced the money, the repayment of which was so secured. Under an order made in this suit on the 31st of July, 1874, without prejudice to Mr. *Nugee's* right to raise any question of set-off, Mr. *G. Nugee* paid the sum of £4931 16*s.* into Court, to a separate account.

On the 24th of July, 1874, Mrs. *Field*, for valuable consideration, assigned to Mr. *G. Nugee* all her interest in the said sum of £2111 15*s.* 6*d.* due from *Pollock's* estate.

Mr. *G. Nugee* now presented a Petition claiming to be entitled to set off the said sum of £2111 15*s.* 6*d.* due from *Pollock*, together with interest thereon from the death of *Pollock*, against the debt

of £4931 16*s.* due by Mr. *G. Nugee*, and praying that the said sum of £2111 15*s.* 6*d.* with interest, might be paid to him out of the fund standing to the separate account.

Mr. *G. Nugee* and his co-trustee made an affidavit stating that as trustees they had not, nor had either of them, any claim or interest to or in the said sum of £2111 15*s.* 6*d.* or the interest thereon; and that the said sum belonged to Mr. *G. Nugee* and to Mrs. *Field* and her assigns absolutely.

Mr. *Chitty*, Q.C., and Mr. *Ince*, for the Petitioner:—

The law on the subject of set-off is laid down in *Story's* Equity Jurisprudence (1) as follows: "Where there are cross demands between the parties of such a nature that if both were recoverable at law they would be the subject of a set-off, then and in such a case, if either of the demands be a matter of equitable jurisdiction, the set-off will be enforced in equity. As, for example, if a legal debt is due to the Defendant by the Plaintiff, and the Plaintiff is the assignee of a legal debt due to a third person from the Plaintiff, which has been duly assigned to himself, a Court of Equity will set off the one against the other, if both debts could properly be the subject of a set-off at law." The present case clearly falls within the law as thus laid down.

[The MASTER OF THE ROLLS:—Mrs. *Field* did not assign her interest in the debt until after the decree, and consequently the claim must fail to the extent of that interest.]

At all events, it is good to the extent to which the debt was due at *Pollock's* death to Mr. *Nugee* in his own right. The proposition in *Story* is borne out by *Clark* v. *Cort* (2); *Jones* v. *Mossop* (3); *Cochrane* v. *Green* (4); *Bailey* v. *Finch* (5). It has been held at law that a Defendant might set off a debt due to him from the *cestui que trust* of the Plaintiff: *Bottomley* v. *Brooke* (6); but perhaps the decision cannot now be relied on: *Tucker* v. *Tucker* (7); *Isberg* v. *Bowden* (8). In all cases of set-off the equitable title is

(1) Pl. 1436 a.
(2) Cr. & Ph. 154.
(3) 3 Hare, 568.
(4) 9 C. B. (N.S.) 448; 30 L. J. (C.P.) 97.
(5) Law Rep. 7 Q.B. 34.
(6) Cited 1 T. R. 621.
(7) 4 B. & Ad. 745.
(8) 8 Ex. 852.

M. R. 1875 — MIDDLETON v. POLLOCK. — *Ex parte* NUGEE.

looked at; here the Petitioner's title is clearly established, the trustees having disclaimed all interest; and effect ought to be given to the set-off so as to avoid circuity of action. In *Freeman* v. *Lomas* (1) a claim of set-off by an executor and residuary legatee against the administrator of a deceased legatee of whom he was creditor was disallowed; but there the creditors were not parties to the proceedings, and could not have been bound: whereas this is a creditor's suit. *Bousfield* v. *Lawford* (2) also supports our case.

[They also cited *Montague* on Set-off (3); *Evans' Pothier* on Obligations (4).]

Mr. *Fry*, Q.C., and Mr. *Romer*, for the Plaintiffs:—

The cases of *Whyte* v. *O'Brien* (5) and *Rawson* v. *Samuel* (6) are conclusive against this claim; and there is not the slightest authority in favour of it except the *dicta* of *Erle*, C.J., and *Williams*, J., in *Cochrane* v. *Green* (7), and these were founded on a misconception of *Clark* v. *Cort* (8).

Mr. *W. Barber*, for the Defendant.

Mr. *Chitty*, in reply.

SIR G. JESSEL, M.R.:—

In my opinion this Petition fails. The case made by the Petitioner is a very singular one. The Petitioner is one of two trustees of the will of a testator who died a great many years ago. The accounts of the estate have never been taken in the sense of being taken under the direction of a Court of Equity. Under the will the Petitioner and a Mrs. *Field* were tenants for life of the residue. The Petitioner and a gentleman of the name of *Chapman* were trustees of the residue, which consisted both of real and personal estate. The trustees of the will employed Mr. *Pollock* as their solicitor to manage the trust matters; he was the solicitor

(1) 9 Hare, 109.
(2) 1 D. J. & S. 459.
(3) Page 27.
(4) Vol. ii. p. 114.
(5) 1 S. & S. 551.
(6) Cr. & Ph. 161.
(7) 9 C. B. (N.S.) 448; 30 L. J. (C.P.) 97.
(8) Cr. & Ph. 154.

of the trust. One of the trustees went abroad; the other was going abroad; and being about to go abroad he wrote to the solicitor a letter in these terms:—[His Honour read it.] Under that authority Mr. *Pollock* received the rents of the real estate, and after making some deductions he seems to have divided the residue between the two tenants for life.

The first question I have to decide is, what was the position of Mr. *Pollock* as regards Mr. *Nugee?* I think that Mr. *Pollock* accepted the appointment from Mr. *Nugee* on behalf of both trustees; for though he only got the authority of one, the authority was to act "on our behalf;" and I dare say Mr. *Nugee* had the assent of his co-trustee; but whether he received the rents on behalf of both trustees, or whether he received them as agent of Mr. *Nugee* only, knowing he was one of two trustees, does not appear to me very material. However you treat the demand of Mr. *Nugee*, it is the demand of a trustee and executor against the solicitor of the trustees and executors, and it is not a demand of Mr. *Nugee* in his own right, as being beneficial owner of half the residue of the income after paying the expenses, whatever they may be. Besides this, on the face of the letter Mr. *Nugee* is executor; and it is not merely, therefore, the case of a trustee's demand, but the case of an executor's demand. Whether, therefore, you treat it as the demand of an executor and trustee, or whether you treat it as the demand of a trustee, it is not the demand of a beneficial owner, but it is a demand in another right than as beneficial owner. In fact, however, the total sum received by Mr. *Pollock* was undoubtedly divisible, after deducting some costs, between the two tenants for life, of whom Mr. *Nugee* was one. Now, it appears that Mr. *Nugee* had real estate, which he had mortgaged to two gentlemen, who were, in fact, it is stated, trustees for Mr. *Pollock*. That being so, in equity Mr. *Pollock*, the solicitor, was owner of the mortgage debt which at law was due in the usual way from Mr. *Nugee*, and was secured by the mortgage of his estate; so that this is not quite the simple case of an unsecured creditor. After the decree was made in this suit, Mrs. *Field* assigned her share of the property, that is of the demand, to the Petitioner. Now, after the decree in the suit, you could not alter the rights of the parties; and the claim has been limited to the moiety to which it

M. R.
1875
MIDDLETON v. POLLOCK.
Ex parte NUGEE.

was alleged *Nugee* was beneficially entitled. The first question is, assuming that the mortgage debt was a debt due to *Pollock*, could such a demand as that of the Petitioner be set off against it? Upon that it does appear to me the authorities in Equity are conclusive. It is only necessary to refer to two. One is *Bishop* v. *Church* (1), in which a motion was made for an injunction by the Plaintiff, who was the residuary legatee and surviving executrix of her husband, to whom *C.* and *O.* had given a joint bond. *C.* died, and the Plaintiff was indebted on her own private account to *O.*, who was a bankrupt. The bill was brought against his assignees for an injunction, and to set off what was become due to her as executrix against the debt due from herself to the bankrupt. The judgment is reported as follows: "The Lord Chancellor denied the injunction, and, as to the set-off, said that it was admitted this could not be done at law, nor did he know of any like instance here; the debts are due in different rights; the Act of Parliament of 2 Geo. 2, c. 22, s. 13, does not comprehend this case, nor is it within 5 Geo. 2, for preventing the committing of frauds by bankrupts, for here was no mutual credit between the parties . . . . If this Court was to go into inquiries of this sort, an account must be taken of the testator's whole estate till it was seen if there was a surplus so as thereout to make a set-off." As I understand it, that means this: it will not do for the Plaintiff to say, "I am residuary legatee, and entitled to this money." You cannot ascertain that without taking the account, and for the mere purpose of set-off the Court will not take the account. The other case is *Freeman* v. *Lomas* (2), before Lord Justice *Turner*, when Vice-Chancellor. After referring to the Roman law, he says (3): "The rule then being thus deduced from the Roman law, it is to be seen how it has been dealt with by our Courts, and I believe that upon examining the authorities, it will be found that, except under special circumstances, Courts of Equity have never allowed cross demands existing in different rights to be set the one against the other. The cases on this point cited on the part of the Plaintiffs, to which may be added *Chapman* v. *Derby* (4), are distinct authorities against the right, in an ordinary case, to apply one of such

(1) 3 Atk. 691.
(2) 9 Hare, 109.
(3) 9 Hare, 113.
(4) 2 Vern. 117.

demands in satisfaction of the other; but it is not to be denied, on the other hand, that agreement, express or implied, may confer such a right." That is the exception; and he goes on to say that slight evidence of the agreement will do. There is no agreement alleged or pretended in this case. Then he says: "This being the position of the general question as it stands upon the authorities, it is hardly necessary to consider the reasons on which the rule of the Court is founded. It is sufficient to refer to the judgment in *Jones* v. *Mossop* (1) as explaining the principle of the rule, and to the judgment in *Bishop* v. *Church* (2) as pointing out the inconveniences to which a contrary rule would lead. It may be said that in the present case the admission of assets removes many of those inconveniences." That was an admission by the administrator; it was the case of a husband who was the administrator to his wife, and he admitted that there were no debts, and therefore it was his own property. "But surely," he continues, "the right cannot depend upon the amount of the assets. If the right exists where the assets are fully sufficient, must it not exist to the extent to which they are sufficient? The inconvenience, too, of mixing the demands is hardly less whether the assets be sufficient or not; for if the account should afterwards be taken with the residuary legatee, the Court would be driven to the ascertainment of the debt due to the executor from the legatee; and although in this particular case the executor may be himself the residuary legatee, I cannot see how the right can be made to depend upon that fact. The same state of circumstances existed in *Medlicott* v. *Bowes* (3), where *Jane Bowes* was (as I have ascertained from the Registrar's book) the executrix and residuary legatee of Dr. *Bowes*, but the Court nevertheless refused the set-off, and acted upon the broad general rule that there was no right of set-off at Law and no right in Equity before the introduction of set-off at Law." The result is that this being a demand *en autre droit*, there is no sufficient ground for the claim now made in respect of it.

There is another objection as to which I think it right to say a word or two. The Petitioner relied on a decision of the Court of Common Pleas, in which it was supposed, certainly by Mr. Justice

(1) 3 Hare, 568. (2) 3 Atk. 691.
(3) 1 Ves. Sen. 207.

M. R. 1875 MIDDLETON v. POLLOCK. — *Ex parte* NUGEE.

*Williams,* and probably by Lord Chief Justice *Erle,* that the established rule of equity with reference to set-off is to look upon the beneficial owner as the real owner, and by injunction compel other Courts to recognise his rights and to disregard the legal title of the trustee. They appear to have grounded their decision on *Clark* v. *Cort* (1), which the Lord Chief Justice says seems to be distinct authority that a Court of Equity will allow the Defendant, where the debt is due to a trustee for him by the Plaintiff, to have all the benefit of a legal owner; in other words, the Court of Equity will allow a set-off. If I may say so, with great respect to those learned Judges, that is all right, with one addition, which is, that it must have been a case in which there was equitable jurisdiction. The mere fact of the cross demand existing would not itself give equitable jurisdiction, nor the mere fact that one of the demands was held by a trustee; that is to say, that one of the demands, though still a legal demand, was, as regards beneficial ownership, the property of the person who was liable to the other demand. I never heard of a bill to enforce such a set-off, although there was a time when every possible device was resorted to in order to obtain an injunction to restrain an action at law. In *Clark* v. *Cort,* and in the next succeeding case of *Rawson* v. *Samuel* (2), Lord *Cottenham* does state the case exactly as I have mentioned it. He says (3): "The case, then, is not that of a mere assignee of a legal debt coming into equity to have the benefit of a set-off which he could not have at law. It is therefore not necessary to decide what the Court would do in such a case, though the decision in *Williams* v. *Davies* (4) goes much further than such a case would require." Then he goes on (5): "As Equity recognises the assignee of a debt as the creditor, and as these demands, if both were recoverable at law, would be the subject of set-off, so if Equity has jurisdiction of the subject-matter it will enforce the set-off;" not that it will enforce the set-off without any special jurisdiction. He would have said, so Equity will enforce the set-off, if that were the doctrine; but he says, so if Equity has jurisdiction of the subject-matter, which is the condition precedent. It

(1) Cr. & Ph. 154.
(2) Ibid. 161.
(3) Cr. & Ph. 159.
(4) 2 Sim. 461.
(5) Cr. & Ph. 160.

seems to me that that was not noticed by the learned Judges in the Court of Common Pleas. When you come to *Rawson* v. *Samuel*, I think he puts that very plainly. He says (1): "We speak familiarly of equitable set-off as distinguished from the set-off at law, but it will be found that this equitable set-off exists in cases where the party seeking the benefit of it can shew some equitable ground for being protected against his adversaries' demand." Then he goes on (2): "Several cases were cited in support of the injunction, but in every one of them, except *Williams* v. *Davies*"—which he disapproved of—"it will be found that the equity of the bill impeached the title to the legal demand." Therefore I am not able to assent to the doctrine laid down by the Court of Common Pleas; and if it had been necessary—which it is not—in this case to decide, upon that ground, I should have thought I was following the decision of Lord *Cottenham* in deciding exactly the other way. This being so, I must dismiss the Petition with costs.

Solicitors: Messrs. *Chauntrell, Pollock, & Mason;* Messrs. *Farrer, Ouvry, & Co.;* Messrs. *Ridsdale, Craddock, & Ridsdale.*

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## PLYMPTON *v.* MALCOLMSON.



[1875 P. 39.]

*Patent—Actual User—Infringement—Interim Injunction.*

An interim injunction will not be granted to restrain infringement of a patent several years old but never established by legal proceedings, unless there has been actual user of the patent for a considerable time.

THIS was a motion by the Plaintiff in the suit, who claimed to be the owner of a patent, for an interim injunction to restrain the Defendant from making, selling, or using an article which was alleged to be an infringement of the Plaintiff's patent.

The Plaintiff's patent was dated the 25th of May, 1865. The Defendant had obtained a patent dated the 7th of May, 1874.

(1) Cr. & Ph. 178. (2) Cr. & Ph. 179.

M. R. 1875

PLYMPTON v. MALCOLMSON.

The Plaintiff filed his bill to establish the validity of his patent, and to restrain the Defendant from infringing it.

There was no evidence of actual user of the Plaintiff's patent except of recent date.

Mr. *Webster*, Q.C., Mr. *Aston*, Q.C., and Mr. *Lawson*, in support of the motion, contended that the Plaintiff's patent had been sufficiently long in existence to entitle him to an interim order for protection. They stated at the bar that the patent had been more or less in use for several years. They cited *Dudgeon* v. *Thomson* (1).

Mr. *Southgate*, Q.C., and Mr. *Hemming*, for the Defendant.

SIR G. JESSEL, M.R.:—

When a patentee comes to this Court for interim protection on the ground of previous enjoyment, he must shew that there has been an actual public user of his patent. In this case there is no evidence of actual user for any number of years. I wish it also to be understood that, where it appears that there is a serious question to be tried at the hearing, it is not the course of this Court to grant an injunction on an interlocutory application. I have always thought the rule laid down by Vice-Chancellor *Kindersley* a sound one, to avoid expressing, as far as possible, on an interlocutory application, an opinion upon the merits of a case; and in accordance with that rule I say no more on the present occasion. Let the present motion stand over till the hearing; the Defendant undertaking to keep the usual accounts.

Solicitor for the Plaintiff: Mr. *W. Clarke*, agent for Messrs. *Clarke & Howlett, Brighton.*

Solicitors for the Defendant: Messrs. *Tilleard & Co.*, agents for Messrs. *Black, Freeman, & Gell, Brighton.*

(1) 22 W. R. 464. WN (1874) 73.

## *In re* HARPER AND GREAT EASTERN RAILWAY COMPANY.

M. R.
1875
Feb. 9.

*Arbitration—Submission by Consent—Lands Clauses Consolidation Act*, 1845 (8 *Vict.* c. 18), ss. 36, 68—*Common Law Procedure Act*, 1854 (17 & 18 *Vict.* c. 125), s. 17—9 & 10 *Will.* 3, c. 15—*Setting aside Award—Time.*

*Semble*, a submission to arbitration under the *Lands Clauses Consolidation Act*, 1845, is not a "submission by consent" within the meaning of the *Common Law Procedure Act*, 1854, s. 17.

The conflict between *Ex parte Harper* (1) and *In re Newbold and Metropolitan Railway Company* (2) and *Rhodes* v. *Airedale Drainage Commissioners* (3) explained.

Where a submission is made a rule of Court under sect. 36 of the *Lands Clauses Act*, the Court has the same jurisdiction in dealing with it as in the case of submissions under 9 & 10 Will 3, c. 15, and any application to set it aside must be made within the time thereby limited.

Where an award had been made on a claim against a company in respect of lands alleged to be injuriously affected under an agreement for reference pursuant to sect. 68 of the *Lands Clauses Act*, the umpire having awarded that the company should pay a specified sum by way of compensation:—

*Held*, that though in form the umpire had no power to order the company to pay, yet that such informality did not vitiate the award so far as it ascertained the amount of damages, assuming the company's liability.

THIS was a motion to set aside the award of the umpire in a question of disputed compensation between the *Great Eastern Railway Company* and *T. E. Harper*, who claimed to be entitled to compensation from the company in respect of certain property situate at 33 and 34 *Sun Street*, alleged to be injuriously affected by the company's works.

On the 29th of January, 1874, *Harper* served on the company a notice in writing requiring them to appoint an arbitrator on their behalf to assess the amount of compensation under sect. 25 of the *Lands Clauses Consolidation Act*, 1845. Pursuant to this notice, an arbitrator was appointed in writing by the company, and another was afterwards duly appointed in writing by *Harper*. The two arbitrators afterwards appointed in writing an umpire.

On the 6th of July, 1874, the umpire made his award, and

(1) Law Rep. 18 Eq. 539. (2) 14 C. B. (N.S.) 405.
(3) Law Rep. 9 C. P. 508.

M. R. 1875 *In re* HARPER AND GREAT EASTERN RAILWAY CO.

thereby, after reciting the notices and the appointment of arbitrators and of himself as umpire, and that he, as such umpire, and in accordance with the provisions of the said Act and with the consent of both parties, had proceeded to consider and determine the question of compensation, and had been attended thereon by the said parties or their surveyors, he awarded as follows:—

"Now therefore know ye, and these presents witness, that in pursuance and exercise of the power and authority vested in me as such umpire as aforesaid, and of every other power or authority me enabling under the provisions of the *Lands Clauses Act*, 1845, I do hereby award that the *Great Eastern Railway Company* do pay to *T. E. Harper* the sum of £500 as and by way of compensation for having, in the exercise of their parliamentary powers, injuriously affected Nos. 43 and 44 *Sun Street*, to which the said *T. E. Harper* claims to be entitled."

On the 30th of July, 1874, on the application of *Harper*, the Master of the Rolls ordered that the submission to arbitration and the subsequent appointment of the arbitrators and umpire might be made a rule of Court under sect. 17 of the *Common Law Procedure Act: Ex parte Harper* (1).

On the 2nd of December, 1874, on the application of *Harper*, under sect. 35 of the *Lands Clauses Consolidation Act*, 1845, the Master of the Rolls made an order that the company should take up the award within four days at their own expense, and furnish a copy of it to *Harper*.

The company now moved that the award might be set aside.

Mr. *Fry*, Q.C., and Mr. *Smart*, in support of the motion:—

The award of the umpire in this case is in excess of his jurisdiction. He has awarded that the company do pay the sum of £500, whereas he has no power to determine the liability of the company, only the amount of the compensation, assuming them to be liable. The award should have been made in terms subject to the provisions of the 68th section of the *Lands Clauses Act*, but being made in this form it is bad, and should be set aside.

In the case of *In re Newbold and Metropolitan Railway Com-*

(1) Law Rep. 18 Eq. 539.

*pany* (1) it was held that the award of arbitrators or an umpire, upon a claim for compensation for lands injuriously affected under the *Lands Clauses Act*, merely ascertained the amount, not the claimant's right to compensation. The Court in that case considered that such an award could not be enforced by motion, and in *Rhodes* v. *Airedale Drainage Commissioners* (2) it was held that a reference under the *Lands Clauses Act* was not a reference "by consent" within the meaning of the *Common Law Procedure Act* (17 & 18 Vict. c. 125).

It may be contended on behalf of the claimant in this case that the present application is made too late, because by 9 & 10 Will. 3, c. 15, s. 2, it is provided that any application to set aside an award under that statute must be made in the Court where the rule is made for submission to such arbitration, before the last day of the next term after such arbitration is made or published. But that statute has no application to a submission by agreement under the *Lands Clauses Act*, and the second section refers only to the setting aside of awards through corruption or undue practice.

Further, the object of the Legislature in providing, by sect. 36 of the *Lands Clauses Act*, that a submission to arbitration may be made a rule of Court, is to enable the Court to set aside the award. Such a power must be inherent in the Court when the arbitrators or umpire exceed their jurisdiction.

Mr. *Roxburgh*, Q.C., and Mr. *Graham Hastings*, for *Harper*, were not called on.

SIR G. JESSEL, M.R.:—

I should like to make an observation upon my decision in *Ex parte Harper* (3), which may mislead some persons. When I decided *Ex parte Harper*, neither the case of *In re Newbold and Metropolitan Railway Company* nor the case of *Rhodes* v. *Airedale Drainage Commissioners* was cited. If either or both of those cases had been cited, I should unhesitatingly have followed them, they being decisions of a Court of co-ordinate jurisdiction, much as I should lament the narrow view which appears to me

(1) 14 C. B. (N.S.) 405. (2) Law Rep. 9 C. P. 508.
(3) Law Rep. 18 Eq. 539.

M. R. 1875

*In re* HARPER AND GREAT EASTERN RAILWAY CO.

to have been taken of a very beneficial statute. In order to shew what I mean by narrow view, I will say a word or two about previous legislation.

By the Act 9 & 10 Will. 3, c. 15, agreements to submission to arbitration could be made rules of Court, and when so made could be enforced by the Court of which those agreements were made rules. By the *Common Law Procedure Act*, 1854 (17 & 18 Vict. c. 125), great improvements were made as regards not only the form of the submission to arbitration, but the form of enforcing it and varying the award, and so on. Unfortunately, as it appears to me, the words of the Legislature divided the awards under the *Common Law Procedure Act* into two classes, those made by order of the Judge in an action or suit, and those made by consent; and it improved the processes relating to both those awards in a very beneficial way. I thought in *Ex parte Harper* (1), when it was before me, that the intention of the Legislature was sufficiently manifest to improve the proceedings on all kinds of submissions and on all kinds of awards, and that though the terms used were, in the one set of sections, "the order of the Judge," and in the other set of sections "by consent," I thought a liberal and fair reading of the statute was that all kinds of submissions were to be brought within the beneficial operation of that statute, and that, therefore, where it was not an order of a Judge, it might be taken as being a submission "by consent," and the more so, as another clause pointed to a class of submissions which was not in the first instance subject to the jurisdiction of any particular tribunal. By so reading it I admit taking the word "consent" in a large sense, that is, not as merely meaning the consent of the parties actually given at the time, but including consent derived from statutory enactments which said that if you did certain acts the other party might drive you to submission to arbitration. It was used, I thought, in that sense—I admit a very large sense of the word.

But it appears that the Court of Common Pleas has twice decided that the word "consent" is to be read in its narrowest meaning; that it is to be confined to those submissions only which are by actual consent of the parties, and therefore does not apply

(1) Law Rep. 18 Eq. 539.

to a submission under the *Lands Clauses Consolidation Act*, notwithstanding that those submissions may be made rules of Court, because there is no actual consent, it being, so to speak, a compulsory reference to arbitration.

The result, therefore, of those decisions is this, that the beneficial operation of the Act of 1854, which I think was intended to apply to every kind of submission, does not apply to a submission which is made a rule of Court under the *Lands Clauses Consolidation Act*. I regret the decisions; but I shall most unhesitatingly follow them, because, as I have frequently expressed my opinion before, I think it is not proper for one Court of co-ordinate jurisdiction to refuse to follow the decision of another, merely because the Court thinks it erroneous. There must be something more. There must either be current of authority of superior, or at least co-ordinate, Courts against it, or else it must be a recent decision inconsistent with the plain terms of the statute. I have always confined my expression of dissent to those two cases. I should certainly have done the same thing in *Ex parte Harper* (1) if either of the decisions had been cited to me; although at the same time I agree that if it had been left to me to decide in the first instance, I have no doubt I should, on consideration, have taken the same view that I do now—I mean I should take the liberal construction of the statute of 1854, making its beneficial enactments apply to all kinds of submissions.

Passing from that case, I have now to consider the application to set aside the award in the very case, and the question to be decided is, what is the meaning of the 36th section of the *Lands Clauses Consolidation Act?* The 36th section of the *Lands Clauses Consolidation Act* enacts as follows:—"The submission to any such arbitration"—that is, an arbitration under the Act—"may be made a rule of any of the Superior Courts on the application of either of the parties." It is not contended before me that the words "any such arbitration" are confined to the arbitrations mentioned in the prior section; nor could it be, for there are terms in the subsequent part of the statute shewing that those clauses apply to arbitrations under the subsequent sections, including the 68th section, which is the one in question. The 37th

(1) Law Rep. 18 Eq. 539.

M. R. 1875. *In re* HARPER AND GREAT EASTERN RAILWAY CO.

section goes on in this way: "No award made with respect to any question referred to arbitration under the provisions of this or the special Act shall be set aside for irregularity or error in matter of form." Therefore, there are two things contemplated; one is, that you may make this submission a rule of Court; and the second is, that there is some power of setting it aside, which is restricted by the terms of the 37th section.

Now, the jurisdiction, whatever it is, is conferred simply by the words making the submission a rule of Court. It is admitted that before the statute of Will. 3, there was no power of setting aside the award on motion or summary application, or in any way except by bill. The Legislature, in passing the *Lands Clauses Consolidation Act*, intended the judicature to understand that by making a submission a rule of Court, a new statutory jurisdiction was conferred upon the Courts of Law.

What was the jurisdiction so conferred, or intended to be conferred? I think there can be no doubt at all as to the proper answer to be given to that question. The well-known statute of 9 & 10 Will. 3, c. 15, was the only one regulating submissions to arbitration. The terms of that statute shew that where the parties have agreed to submit to arbitration, and that the submission shall be made a rule of Court, it shall be made a rule of Court, and when made a rule of Court, that the Court shall have power to enforce it or to discharge it, and compel its observance in any way which may be required by the nature of the case. The statute enables the parties by consent, by the express terms of the agreement, to make the submission a rule of Court. But when it is made a rule of Court a large jurisdiction is given to the Court as to dealing with such submission.

Then when we find a second statute which simply provides that something which could not have been made a rule of Court under the prior statute, may be made a rule of Court, and which evidently contemplates the power of the Court to set aside the award made under that submission, does it not follow from the nature of the case that the jurisdiction intended to be conferred on the Courts by the words of the 36th section was the same as was conferred upon the Courts by the terms of the 1st section of the statute of Will. 3, when it was made a rule of Court simply by the agree-

ment of the parties? I think it must so follow, for otherwise I have no means of ascertaining what was the nature and extent of such jurisdiction, and I so hold.

The next question is, whether the practice as to the time within which application should be made to set aside an award which is enacted by that statute, shall not follow in the same way as the rest of the jurisdiction conferred? I think it ought so to follow. But, independently of that observation, if I could hold that the making the submission a rule of Court conferred only a similar instead of the same jurisdiction, I should still be of opinion I ought to follow the rule as to the period within which application may be made for setting the award aside. Upon either ground I should come to the conclusion that the present application is made too late.

It has been argued that you cannot enforce an award of this kind in the sense of ordering a party to perform it, because there is a condition precedent before you can enforce it. That appears to me no objection, for the same thing occurs under a submission by mere agreement.

If one man makes a claim against another for damages, it is competent to the parties to agree to refer the amount of the damages to be assessed by an arbitrator without prejudice to the question whether there is any legal liability at all, leaving that question to be decided in an action or upon a special case, and when that is decided, and not before, the award becomes enforceable. It can make no difference whether the condition is expressed on the face of the submission, or is covered by the section of the Act of Parliament, which says that it is included in every such submission.

It appears to me, therefore, that there is no objection upon that ground.

That being so (and it is a question which does not seem to me to arise, because the statute says it may be made a rule of Court), the next question is, whether there is any objection to the award.

The objection made is a singular one. The 68th section of the *Lands Clauses Act*, which is the section upon which the parties have proceeded, is this:—

"If any party shall be entitled to any compensation in respect

M. R. 1875 *In re* HARPER AND GREAT EASTERN RAILWAY CO.

of any lands, or of any interest therein, which shall have been taken for or injuriously affected by the execution of the works, and for which the promoters of the undertaking shall not have made satisfaction under the provisions of this or the special Act, or any Act incorporated therewith, and if the compensation claimed in such case shall exceed the sum of fifty pounds, such party may have the same settled either by arbitration or by the verdict of a jury, as he shall think fit; and if such party desire to have the same settled by arbitration, it shall be lawful for him to give notice in writing to the promoters of the undertaking of such his desire, stating in such notice the nature of the interest in such lands in respect of which he claims compensation, and the amount of the compensation so claimed therein; and unless the promoters of the undertaking be willing to pay the amount of compensation so claimed, and shall enter into a written agreement for that purpose within twenty-one days after the receipt of any such notice from any party so entitled, the same shall be settled by arbitration in the manner herein provided."

What is the manner therein provided? That the arbitrator shall decide the amount to be paid as payable by the company, subject of course to the question, which is not within his jurisdiction, whether there is any liability to pay at all. So that what he has to decide is, that if there is a liability the company is to pay such sum as that at which he assesses the damage. But the "if" is in the section, not in the award. He has nothing to do with that. He should say, "Assuming the company is liable to pay, I award that the company do pay such a sum." But then it is said that because he has not set out the words "assuming the company is liable to pay," and only says, "I award that the company do pay," the award is bad. But, so far as he can award, he does award that the company do pay if they are liable. It is not an excess of jurisdiction, it is mere form. The point that is referred to here is the amount, and there are recitals in the award shewing exactly what the matter referred to him was, namely, to assess the amount payable by the company. And I am told that because he has not said, "subject to the provisions of the 68th section of the Act," therefore the award is bad, though there is a recital that it is in execution of the powers of the Act of Parliament, that

notices were given, and that the reference was in pursuance of the Act. It appears to me the very thing provided for by the Act.

But then the 37th section seems to me to apply, which provides, "No award made with respect to any question referred to arbitration under the provisions of this or the special Act shall be set aside for irregularity or error in matter of form." This is form and form only. The arbitrator had no power to order the company to pay unless they were liable, and when he decided that they should pay he decided subject to that which is a provision of the Act of Parliament.

In my opinion the award is perfectly good. The objection, if of any validity at all, is merely form; and if I had to decide this case irrespective of the question of time, I should decide it in the same way as I do now, that the motion must be refused with costs.

Solicitor for the Company: Mr. *Shaw*.
Solicitor for Mr. *Harper*: Mr. *E. Broad*.

V.-C. M.

1875

*April* 16.

## *In re* HALSTEAD UNITED CHARITIES.

*Payment out of Court—Mortgagees—Tender of* 40*s. for Costs—Affidavit of Service—Lands Clauses Act.*

The rule that where incumbrancers are parties to a petition for the reinvestment in land of money paid into Court under the *Lands Clauses Act*, 40*s.* costs ought to be tendered to such parties at the time of service of the petition in order to discourage unnecessary appearances, applies to the case of payment out of Court of such moneys to persons entitled subject to incumbrances; but the Petitioners will be entitled to add to their costs of the petition, in addition to the 40*s.*, a sum sufficient to cover the costs of an affidavit of service.

THIS was a Petition for payment out of Court of a sum of £2315, which had been paid in as the purchase-money of certain land which had been vested in the Petitioners as trustees of the *Halstead United Charities*, and had been taken by the *Colne Valley and Halstead Railway Company* under the provisions of the *Lands Clauses Consolidation Act.*

Part of the charity lands, including part of that taken by the company, had been mortgaged by a deed of the 6th of August, 1862, for £1000, and this sum remained a charge upon the fund in Court; and the Petition stated that the mortgagees were willing to consent to the payment out, being satisfied that the residue of the security for the £1000 and interest was ample.

Mr. *Colt*, for the Petitioners.

Mr. *Osler*, for the mortgagees who had been served, concurred.

Mr. *Graham Hastings*, for the company:—

The rule has now been laid down by *In re Gore Langton's Estates* (1) that where, in the case of petitions under the *Lands Clauses Act*, there are incumbrancers who, as a matter of form, are necessary parties, but have no interest in opposing, it is the duty of the parties serving them with the petition to tender 40*s.* for the costs of obtaining the advice of their solicitor as to whether their

(1) Law Rep. 10 Ch. 328.

appearance is necessary, and if they afterwards appear, they do so at their peril as regards costs. It was quite unnecessary for these mortgagees to appear, and they ought to bear the costs over and above the 40*s.* which ought to have been tendered.

Mr. *Colt*, in reply :—

*In re Gore Langton's Estates* (1) does not apply to the case of payment of money out of Court to persons absolutely entitled. That was the case of a settlement, and the object of the petition was simply the re-investment in land of the money in Court, and the security of the incumbrancers was not diminished. Here it is proposed to take away an important part of the security of the mortgagees, and they are at least entitled to be heard on the question. But even if the rule does apply, the Petitioners could not have obtained the order except upon production of an affidavit of service of the Petition, and they ought at least to be entitled to add the costs of the affidavit of service to their costs of the Petition, in addition to the 40*s.* which would be allowed.

SIR R. MALINS, V.C. :—

I think this case is even plainer than *In re Gore Langton's Estates*. In that case there were two points, and the Lords Justices affirmed my decision on the first point, while on the second they varied it by laying down a general rule, that where persons who are the necessary parties to a petition have no interest in opposing it, the proper course is to serve them with the petition, and at the same time tender 40*s.* to enable them to take advice as to whether they should appear. This Petition states the mortgage, and also that the mortgagees were willing to consent to the payment of the fund to the Petitioners. Therefore, considering that they are stated to concur in the Petition, I think they would not have appeared if 40*s.* had been tendered them. The case thus comes strictly within the rule laid down by the Court of Appeal, and I cannot allow more than 40*s.* costs of appearance. But Mr. *Colt* says that it would be necessary to satisfy the Court of the fact of the service. I think, therefore, that it will be proper to allow the 40*s.*, and so much more as the costs of an affidavit

(1) Law Rep. 10 Ch. 328.



BIBL. LONDIN UNIV.

V.-C. M. 1875 *In re* Halstead United Charities.

of service would have come to. A fair sum for this purpose would be about £1 3*s*. Therefore I allow £3 3*s*. for the costs of the incumbrancers, and there will be leave to take the residue of the costs out of the fund.

Solicitors: Messrs. *Aldridge & Thorn;* Mr. *W. Eley;* Messrs. *Baxters & Co.*

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V.-C. M. 1875 *April* 19.

## HARNETT *v.* BAKER.

[1873 H. 69.]

*Specific Performance—Conditions of Sale misleading and erroneous.*

Upon the sale of an estate one of the conditions was that the title to the beneficial ownership should commence with the will of *A. C.*, and the purchaser must assume that *A. C.* was at his death beneficially entitled to the property in fee simple free from incumbrances. *A. C.* had contracted before his death for the purchase of the property, but it was not till many years after his death that the title was made out, the property conveyed, and the purchase-money paid:—

*Held*, that the purchaser was not bound by the condition of sale, and the vendor declining an open reference as to title, his bill for specific performance was dismissed with costs.

THIS was a suit to enforce specific performance of an agreement entered into by the Defendant to purchase from the Plaintiff certain freehold property situate in *Eastcott, Middlesex.* The property was put up for sale by auction on the 10th of September, 1872, subject to conditions of sale, and the Defendant became the purchaser for £2300. The Defendant refused to complete, on the ground that the conditions of sale were unfair and misleading, and were not binding upon him, and that a good title had not been shewn by the Plaintiff to the property in question.

The 4th condition was as follows:—

"The title to the beneficial ownership of the property shall commence with the will of Dr. *Adam Clarke*, dated the 17th of August, 1829, and the purchaser shall assume that the said Dr. *Adam Clarke* was at his death beneficially entitled to the property in fee simple, free from incumbrances. The purchaser shall not

require the production of, or investigate, or make any objection or requisition in respect of any matter prior to the commencement of title, whether appearing on the abstract or not."

And the 6th condition was:—

"The property has been, as appears by the abstract, beneficially enjoyed for more than thirty years past, either by Mr. *John Harnett* and his late wife together, or since her death by Mr. *John Harnett* alone, but the legal estate did not become vested in him until the 2nd of April, 1867. The legal title to the property shall commence with a settlement dated the 7th of July, 1853. The purchaser shall not require the production of, or investigate, or make any objection or requisition in respect of any matter affecting the legal title prior to such commencement thereof, whether appearing on the abstract or not."

The Defendant alleged that the suggestion in the 4th condition of sale, that Dr. *Adam Clarke* was at his death absolutely entitled to the beneficial ownership of the property, was untrue and misleading; for that it appeared from one of the later deeds, stated on the abstract, that Dr. *A. Clarke* had attempted to purchase the property from trustees of the will of *George Woodroffe*, deceased—persons who had no title to sell either at law or in equity—that in fact the purchase-money had not been paid by Dr. *Clarke* to his vendors in his lifetime, and that the greater part of such purchase-money was not paid to any of the representatives of *George Woodroffe* until the 2nd of April, 1867, the date at which the Plaintiff pretended that the legal title became vested in him. And further, that this appeared from the abstract to have been known to the Plaintiff personally, for that the deed of the 2nd of April, 1867, and also an indenture of mortgage dated the 20th of November, 1849, severally stated in the abstract, contained recitals shewing that the greater part of the purchase-money had been invested by Dr. *A. Clarke* in bank annuities until a title could be made to the property, and that the Plaintiff, by such indenture of mortgage of the 20th of November, 1849, purported to charge the said bank annuities, then representing the balance of such purchase-money, as a security to his mortgagee. And further, even if the 4th condition of sale was strictly binding upon the Defendant, as the Plaintiff alleged, and Dr. *A.*

V.-C. M. 1875 HARNETT v. BAKER.

*Clarke* was at his death beneficially entitled to the property, the title of the persons entitled to give a receipt for the unpaid purchase-money, mentioned in the deed of the 20th of November, 1849, should have been, and had not been, properly shewn, and that, according to the terms of such condition, if taken literally, the Defendant was not bound to assume that Dr. *Clarke* was at the date of his will beneficially entitled to the property, which assumption would be necessary in order to support the title shewn by the Plaintiff; and that the Plaintiff, in order to force a title upon the Defendant, depending upon the will of Dr. *Clarke*, should, notwithstanding such condition, shew that Dr. *Clarke* was entitled to the property at the date of his will, which he had not done.

The answer then set out the effect of the deeds of the 7th of July, 1853, and the 2nd of April, 1867, for the purpose of shewing that the parties who assumed to convey the legal estate by the deed of April, 1867, had only a power of sale, and no power to confirm an old sale made in 1824, and that there was a defect in the title which the Plaintiff was unable, or declined to remove; for that, according to the recitals in these deeds, it appeared that the property was originally devised by a Mr. *Woodroffe* to trustees upon trust to settle, as therein described, with a power of sale. That in 1824 the trustees of the will entered into a contract for sale to Dr. *A. Clarke* before a settlement had been made. That Dr. *A. Clarke* disputed the title, and thereupon the purchase-money was invested by him until a settlement was made and the contract confirmed. That a settlement was made in 1853 by direction of the Court of Chancery, containing the usual power of sale, but no reference to the sale to Dr. *A. Clarke*. That the property increased in value. That in 1867 the trustee of the settlement of 1853, not having the legal estate, but only a power of sale, purported to execute the power by confirming the old sale of 1824, and that this was not within his power of sale.

The Defendant alleged that he was entitled to have evidence of the title of Dr. *Clarke* prior to his will, and that under the circumstances of the case the restrictions contained in the contract were not binding upon him, and he was entitled to have an open reference as to title.

The Plaintiff, by his amended bill, insisted that the Defendant,

by the terms of the 4th condition, was bound to assume that Dr. *Clarke*, at the date of his will, was beneficially entitled to the property, even though by the letter of the condition he might not be so bound. That the property had been held by the Plaintiff and by his predecessors in title under the will of Dr. *Clarke* on the assumption that the testator was beneficially entitled at his death, and that this was, for all practical purposes, identical with the assumption that he was so entitled at the date of his will.

Mr. *Glasse*, Q.C., and Mr. *J. Wilkinson*, for the Plaintiff:—

The purchaser is bound by the conditions of sale. There is nothing unfair or misleading in the statement that Dr. *Clarke* was beneficially entitled to the property at the date of his will. He had entered into a contract for the purchase of the estate some years prior to his death, but at that time the vendor was unable to complete the title; the consequence was that the purchase-money was invested until the conveyance could be executed, but the money found its way into the right hands; and whether or not the conditions of sale were technically and strictly accurate, the Defendant was not misled by the statement, which was practically correct. We say, therefore, that the Defendant was bound to assume under the 4th condition that Dr. *Clarke* was beneficially entitled to the property which has ever since been held under the will by the Plaintiff and those who preceded him in title. A question very similar to this was decided in *Hume* v. *Bentley* (1). In that case, upon a sale by auction of leasehold property, one of the conditions was that the lessor's title would not be shewn, and should not be inquired into. It then appeared upon certain Acts of Parliament produced by the purchaser that the lessor had no power to lease the premises, but it was held that the condition precluded the purchaser from inquiring into the lessor's title for every purpose, and specific performance was decreed.

Mr. *Cotton*, Q.C., and Mr. *Phillpotts*, for the Defendant:—

The Plaintiff avers that a title is shewn according to the contract. The 4th condition distinctly states that the purchaser shall

(1) 5 De G. & Sm. 520.

V.-C. M. 1875 HARNETT v. BAKER.

assume that Dr. *Clarke* was at his death beneficially entitled to the property in fee simple free from incumbrances. It now turns out that Dr. *Clarke*, at the time of his death, had no title whatever beyond possession of the property. He had entered into a contract for purchase, but the vendor was unable to make a title, and consequently the purchase-money was invested by him, but the money had not been paid at the time of his death, and was not paid till 1867. The vendor cannot, therefore, say he was beneficially entitled in fee simple free from incumbrances. The rule is, that the conditions of sale must be made in good faith, and the vendor must not state or suggest things which are not true. We contend that this suggestion is not true, and that it is unfair and misleading. We have shewn by our answer that it appears upon the abstract that a good title cannot be shewn, but we submit that we are not bound to prove that the title is bad. It is for the Plaintiff to make out his title in conformity with the conditions of sale. This he has failed to do, and we are entitled to have the bill dismissed; but still we are willing to take an open reference as to title. The vendor relies on *Hume* v. *Bentley* (1). But the later cases shew that where the conditions are unfair or misleading the Court will not hold the purchaser bound by them.

[Counsel for the Defendant were stopped by the Court.]

Mr. *Glasse*, in reply:—

The only objection to the title is, that Mr. *Woodroffe* gave the property to trustees to settle, and directed that the settlement should contain a power of sale. Instead of settling the property, the trustees of the will in 1824 themselves sold it. On account of the doubt whether or not they had power to do so, the purchase-money was invested, but the purchaser took and retained possession. In 1853 a proper settlement, with power of sale, was executed; and in 1867 the trustee of that settlement executed the power of sale by confirming the sale of 1824, and received the purchase-money. A trustee with power of sale has power to confirm a former sale: *Thomas* v. *Dering* (2). This being the state of the title, we were justified in making these conditions.

(1) 5 De G. & Sm. 520. (2) 1 Keen, 729.

SIR R. MALINS, V.C.:— V.-C. M.

1875

HARNETT v. BAKER.

The sole question in this case turns upon the manner in which the vendor's title is to be made out. The vendor, the Plaintiff, contends that the Defendant is bound by certain conditions of sale under which the property was sold; and it is clear that conditions of sale fairly and honestly made, not founded on any erroneous statement, are binding. But it is equally clear, and I think it is most important it should be understood, that although a vendor is at liberty to introduce special conditions of sale he must not make them the means of entrapping the purchaser, and they must not be founded on any erroneous statement of fact. There must be fair and honest dealing in the transaction, and on that principle only special conditions are sanctioned. Formerly there was considerably more doubt on this part of the case than there is now, because at one time it was held in the common cases of stipulations as to leasehold property, and it was a very prudent and proper stipulation, that the vendor should not be bound to shew the lessor's title. In the case of *Spratt* v. *Jeffery* (1) it was held that a stipulation precluding the purchaser from inquiring into the lessor's title was valid. That was afterwards thought to be unreasonable, and therefore, in the cases of *Shepherd* v. *Keatley* (2) and *Warren* v. *Richardson* (3), it was decided, and it is now finally settled as a rule of law, that although there be a stipulation that the title of the lessor is not to be shewn, although there may be any stipulation that a certain fact is not to be required to be shewn, if it turns out in the first case that the lessor's title is bad, and, in the second case, that the statement of the fact is erroneous, the purchaser may take advantage of the error, and although he is *primâ facie* bound by the conditions, in the result he is not bound at all. Take the case of *Warren* v. *Richardson*. There the property was agreed to be let, and the title accepted, subject to certain inquiries in Chambers, and it turned out that the title of the Plaintiff was, in point of fact, bad for this reason—it was an agreement for a lease of one house, and it turned out that that house and another were held by the Plaintiff under the same lease, at an entire rent, so that the underlessee of house No. 1, though

(1) 10 B. & C. 249. (2) 1 C. M. & R. 117.

(3) You. 1.

V.-C. M. 1875 HARNETT v. BAKER.

he performed all his conditions, would be liable to be evicted if the owner of No. 2 failed in the performance of his conditions. That having come out in the course of investigation, it was held to be a fatal objection, and the bill was ultimately dismissed.

In the present case, it appears that Dr. *Adam Clarke,* in the year 1824, was desirous of purchasing this property, and did purchase it, as he conceived, but the state of things at that time did not enable the parties to make a title. The consequence of that was, that inasmuch as there was no hand into which he could properly pay his purchase-money, nobody at that time competent to give him a receipt for it—not because he was unable or unwilling to pay the purchase-money, but because he could not get a discharge for it—he retained the money and invested it, and held it ever since, till the time of the final completion of the contract, at the disposal of the parties who might ultimately have to receive it.

The consequence of that was, if I am right in my assumption of the fact, that Dr. *Clarke* could not have a good equitable title to this property unless he had a contract signed by the persons who had the control over the fee simple. But if he had a contract signed by such persons, then he had a good equitable title. Still, however, he could not have a good equitable title free from incumbrances unless he paid the purchase-money. First, there is considerable doubt whether he had a contract signed by the parties who had the control over the fee simple; if not, then he was not equitably seised in fee. At any rate, there seems no dispute, as I understand, that the purchase-money was not paid in 1829, and was not paid when Dr. *Adam Clarke* died. But if he was in possession by virtue of a good equitable title, assuming that all necessary parties signed the contract, he was not then a purchaser free from incumbrances, because the whole purchase-money was an incumbrance on the estate. There was a lien on it for the unpaid purchase-money, and a man who has got into possession of an estate which he has contracted to purchase and has not paid for cannot fairly state himself to be the owner in fee free from incumbrances. What is required? It is required that all conditions of sale should be fairly and truly stated. They must not entrap the purchaser by any erroneous statement of facts—and here there is a most erroneous statement of facts—because if this

condition were adhered to, the vendors would simply put in the will of Dr. *Clarke* and say, "Here is the contract of 1824, by which he acquired a good equitable title in 1824 free from all incumbrances; here is his will in 1829, giving it to the persons who now shew title;" and thus they might put it as free from all incumbrances while the purchase-money remained unpaid. I am not saying there was anything improper—it was an erroneous view of the case. The statement is that "The title of the beneficial ownership of the property shall commence with the will of Dr. *Adam Clarke*, dated 17th of August, 1829, and the purchaser shall assume that Dr. *Adam Clarke* was at his death beneficially entitled to the property in fee simple free from incumbrances." That is erroneous. Therefore I say, if, on investigation of the title, it turned out that that was erroneous, that would have been an objection to the title. It is now made apparent to the Court that it is erroneous, and I can give no encouragement to the operation of erroneous conditions of sale. I must have objected to that stipulation when it turned out that it was erroneous if it was heard in Chambers, and I must equally object now at the hearing of the cause. Therefore, I am of opinion, inasmuch as it is open to the purchaser to shew it was an erroneous statement in the investigation of title, that I cannot oblige him to go into investigation of title on that point which is now apparently erroneous at the hearing of the cause. The case of *Hume* v. *Bentley* (1) was cited. That was decided twenty years ago by Sir *James Parker*. It was a case going far beyond *Spratt* v. *Jeffery* (2), and that class of cases, because there was a stipulation, not only that the title should not be investigated, but even that it should not be questioned. Therefore it was most properly, in my opinion, held that, inasmuch as the parties thought proper to enter into a condition that they not only would not require, but would not investigate, the title of the lessor, it was not open to them to go into any investigation or question of it whatever. In this case, if the parties had stipulated that the fact that Dr. *Clarke* had been seised in fee equitably free from incumbrances should not be questioned, then *Hume* v. *Bentley* might have applied; but as it stands at present, in my opinion it has no application to the case.

(1) 5 De G. & Sm. 520. (2) 10 B. & C. 249.

V.-C. M.
1875
HARNETT
*v.*
BAKER.

Then there is this stipulation afterwards: "The purchaser shall not require the production of, or investigate, or make any objection or requisition in respect of any matter prior to the commencement of title, whether appearing in the abstract or not." The first part of that condition provides that the 17th of August, 1829, is to be the commencement of the title; there is, therefore, to be no investigation of title before that time; that is binding. There must not now, if this goes to Chambers, be any investigation of title anterior to the 17th of August, 1829.

I am of opinion, on these grounds, inasmuch as the condition is founded on an erroneous statement of facts—a statement of facts which the vendor was bound to know was erroneous—that it cannot be enforced on the purchaser. The result is, that the Plaintiff must either take a reference, an open reference to title generally, whether a good title can be found, or else he must have his bill dismissed with costs.

Does the Plaintiff elect to take an open investigation of title, or does he elect to have his bill dismissed?

Mr. *Glasse*:—I elect not to take the reference.

The VICE-CHANCELLOR:—It will be better to say: The Court being of opinion that the fourth condition of sale is founded on an erroneous statement of facts, it is not binding on the purchaser; and the Defendant having offered the Plaintiff to take an open reference to title, and the Plaintiff declining, let the bill be dismissed with costs.

Solicitors for the Plaintiff: Messrs. *Pawle & Fearon.*
Solicitors for the Defendant: Messrs. *Walker & Martineau.*

## *In re* BANGOR AND PORTMADOC SLATE AND SLAB COMPANY.

V.-C. M. 1875 April 24.

*Winding-up—Distribution of Surplus—Priority of Preference Shareholders.*

A company having power to increase its capital to such amount and upon such terms, and either with or without special privileges or preferences to the holders of the shares in such increased capital, as they should deem expedient, raised further capital by the issue of preference shares entitled to a preferential interest of 10 per cent. per annum; the amount of such shares to be repaid on six months' notice with 25 per cent. bonus, such payment of interest, repayment, and bonus to take place before any dividend, interest, or other money was payable to the original shareholders. The company was wound up, and after payment of debts there remained a surplus for distribution:—

*Held*, that the company had conferred a preference as to capital, as well as dividend, upon the new shareholders, and that they were entitled to the surplus assets in priority to the original shareholders.

THIS was an adjourned summons, on the application of the liquidators of the *Bangor and Portmadoc Slate and Slab Company*, that they might be at liberty to distribute the surplus assets of the company in their hands on such conditions and in such manner as the Court should think fit. The company was formed in February, 1857, with a capital of £105,000, divided into 5250 shares of £20 each, for working certain slate mines in *North Wales*.

By the articles of association it was provided as follows:—

"11. The company in general meeting may increase its capital to such amount and upon such terms, and either with or without special privileges or preferences to the holders of the shares in such increased capital, as it may from time to time deem expedient, and the same shall be increased accordingly."

"16. Such increased capital shall be raised by the issue of new shares of such amount as the company in general meeting may determine upon, and shall be subject to the several provisions hereinbefore contained, in the same manner as if it had been part of the original capital."

V.-C. M.
1875
*In re* BANGOR AND PORTMADOC SLATE AND SLAB COMPANY.

At an extraordinary general meeting of the company, held on the 21st of April, 1863, the following resolution was passed:—

"That further capital of £5250 be raised by the issue of a like number of preference shares of £1 each, entitled to a preferential interest of 10 per cent. per annum, the amount of such shares (or such part thereof as may have been paid up) to be repaid on six months' notice to expire at any time, with 25 per cent. bonus; such payment of interest, repayment, and bonus to take place before any dividend, interest, or other money is payable to the original shareholders of the company, and at such time as may be determined by resolution of a general meeting called for that purpose, but at which only the holders of original shares shall have votes."

In April, 1870, the company was wound up voluntarily, and the voluntary winding-up was continued under supervision by an order made in July, 1870. The liquidators had paid all the debts of the company, and they had now a surplus in hand of £4594, to be distributed among the shareholders in such proportion as the Court should direct.

Mr. *Higgins*, Q.C., and Mr. *Key*, for the preference shareholders:—

The only question upon this summons is, whether the surplus remaining in the hands of the liquidators, after paying the debts of the company, is to be distributed among the whole body of shareholders, or whether the preference shareholders are to have a priority over the original shareholders. Nothing can be more distinct than the terms of the articles of association, which provide that the company may increase its capital to such amount and upon such terms, and either with or without special privileges or preferences to the holders of the shares in such increased capital as it should deem expedient. The company, therefore, having full power to raise money by means of preference shares, provided by the resolution of April, 1863, that such preference shares should be paid interest, repaid capital, and receive a bonus upon being paid off. The only ground that can be suggested for opposing payment of the capital held by the preference shareholders in priority

to the general body of shareholders, is the case of *Hutton* v. *Scarborough Cliff Hotel Company* (1), where it was held that the company had no power to issue preference shares; but the answer to that case is that the articles gave no power, and that the issuing of preference shares was done without authority. Here the articles gave power to issue preference shares, and the company only acted upon that express power. That case has really nothing to do with the point raised here. *Melhado* v. *Hamilton* (2) was a case of a similar kind, where it was held that the company had no power to issue the shares, and consequently the resolution to do so was void. In *Harrison* v. *Mexican Railway Company* (3) it was decided that the company was not precluded from issuing preference shares under the terms of their articles of association.

Even if the resolution of April, 1863, was invalid, still as the company accepted the money for the purpose of the undertaking, and confirmed the resolution, and adopted all the proceedings, they cannot now escape from their liability. The company acted upon the resolution for seven years, and if it was originally void, still it has been ratified and confirmed by the company. This was the case in *Riche* v. *Ashbury Railway Carriage and Iron Company* (4), where it was held that though the contracts were *ultrà vires*, they had been ratified by the shareholders. The case of *Phosphate of Lime Company* v. *Green* (5) went still further, for it was held sufficient to shew circumstances which were reasonably calculated to satisfy the Court that the thing to be ratified had come to the knowledge of all who chose to inquire.

Then, as to the question whether this is a preference of capital as well as dividend, there is the case of *In re London India Rubber Company* (6), in which it was held that the surplus assets were distributable between both classes of shareholders *pro rata*, but that was decided upon the terms of the contract, which provided that at a particular time the two classes of shares were to be placed on an equality, and there was no provision applicable to the capital of the company. This is a very different case, because the resolu-

(1) 2 Dr. & Sm. 514, 521. 11 Jur. N. S. 849.
(2) 21 W. R. 619. W.N. (1873) 92.
(3) Law Rep. 19 Eq. 358.
(4) Law Rep. 9 Ex. 224; since reversed, Dom. Proc. in W.N. (1875) 123.
(5) Law Rep. 7 C. P. 43.
(6) Law Rep. 5 Eq. 519.

V.-C. M. 1875 *In re* BANGOR AND PORTMADOC SLATE AND SLAB COMPANY.

tion is distinct, that there is to be a repayment of the amount of the shares before any dividend, interest, or other money is payable to the original shareholders.

If we are not preference shareholders, we are not shareholders at all; but the resolution is an express contract between the original and preferential shareholders, and it does not lie with them to object to our claims under that contract; and the case would come under the decision in *In re Cork and Youghal Railway Company* (1), where it was decided that the holders of instruments under the seal of a railway company, given with the knowledge of the shareholders, have a valid claim against the assets of the company, so far as the company had the benefit of the money in respect of which the instruments were given.

Under these circumstances, we submit that we are entitled to a distribution of the surplus in priority to the original shareholders.

Mr. *J. Pearson*, Q.C., and Mr. *Tremlett*, for the trustees of the *Bangor* mining property, submitted that before the shareholders were entitled to share in the surplus, they were bound to execute a deed to indemnify the trustees against the covenants entered into by them, to the extent of the amount received by the shareholders respectively, and cited *Phené* v. *Gillan* (2). They also supported the argument on behalf of the preference shareholders.

Mr. *Glasse*, Q.C., and Mr. *Loughborough*, for the ordinary shareholders:—

In our view of this question, it all depends upon the words of the resolution of April, 1863. We admit that the company had power to raise new capital, and we admit that they did resolve upon giving a preferential dividend to the new shareholders; but we say that there is no provision for any preferential payment in respect of capital upon the winding-up. The resolution of the company is to be read with the terms of the articles of association, which provide that such increased capital shall be raised by the issue of new shares of such amount as the company may determine

(1) Law Rep. 4 Ch. 748. (2) 5 Hare, 1.

upon, "and shall be subject to the several provisions hereinbefore contained, in the same manner as if it had been part of the original capital." The resolution passed at the general meeting was never intended and could not go beyond the powers given by the articles of association. The company had only power to raise new capital in the same manner as if it had formed part of the original capital. Then the resolution is in conformity with that power; that is, they resolved that the further capital be raised by the issue of preference shares of £1 each, entitled to a preferential interest of 10 per cent. per annum. After that it goes on to provide for a case which did not happen—that is, "the amount of such shares to be repaid in six months, notice being given of such repayment." So that, if notice was given to these new shareholders that the capital then raised was to be paid off, then the new shareholders would be entitled to receive their capital with 25 per cent. bonus; and in that case the payment of interest, repayment of capital and bonus was to take place in priority to the original shareholders. This clause provides, therefore, for the case of notice being given to pay off the new shareholders; but as no notice was given, the case did not arise; and in default of such notice the new shareholders are to hold their shares subject to the several provisions contained in the articles in the same manner as if it had been part of the original capital. It is clear that no special provision was made for the event of a distribution of surplus assets after winding up.

The only case which applies to this is that of *In re London India Rubber Company* (1). There there were two sets of shareholders: the A shareholders contributed the money, and the B shareholders contributed the value of the patent rights which were to be worked, for which they were to receive their shares as fully paid up, and the A shareholders were to receive out of the profits the whole amount of their capital with interest at £7 10*s.* per cent. before the B shareholders could participate in the profits. The company was wound up, and it was held that, no profits having been realized, and there being a provision only for preferential dividend, and no provision as to the division of capital upon breaking up, the surplus assets must be distributed between both classes of share-

(1) Law Rep. 5 Eq. 519.

V.-C. M. 1875 *In re* BANGOR AND PORTMADOC SLATE AND SLAB COMPANY.

holders, *pro rata*, without reference to their rights in respect of dividend. This case appears to decide the question raised here, and we therefore claim to have the surplus assets distributed equally between both the original and preference shareholders.

Mr. *Reginald Hughes*, for the official liquidators.

SIR R. MALINS, V.C.:—

The law is settled that where a company is formed with a provision as to raising additional capital, they cannot create preference stock or shares unless they have express power to do so. It was not doubted in *Hutton* v. *Scarborough Hotel Company* (1) and in *Melhado* v. *Hamilton* (2) that if the articles authorized the raising of preference shares, not only as to dividend but as to capital, in the event of breaking up, then the company might pass such a resolution as would effect their object.

The question is whether the articles in this case do authorize the company to charge their property, not only with a preferential payment of dividend, but also of capital, in case of the company being wound up.

It is not disputed in this case that they had power to give a preferential dividend, and the only question is as to the capital. It is clear to me that the articles of association did authorize the creation of preference shares, having such privileges as the company should think fit, including a preference in every respect, both as to dividend and as to capital; and it seems highly probable that unless a company could give such preference, they would frequently be unable to raise the money they require for the undertaking.

Then the only remaining question is whether they have exercised their power in such a manner as to give a preference as to capital as well as dividend. That depends upon the resolution of April, 1863, and, from the terms of that resolution, I am quite clear that the power was executed, and that a priority was given to the new shareholders. The surplus assets must therefore be distributed among the preference shareholders *pro rata*, in repayment of their capital and interest, in accordance with the resolution of April,

(1) 2 Dr. & Sm. 514, 521. (2) 21 W. R. 619.

1863, in priority to the ordinary shareholders. I think the trustees are entitled to the indemnity they require. The costs of all parties are to be paid out of the estate.

V.-C. M.
1875
*In re* BANGOR AND PORTMADOC SLATE AND SLAB COMPANY.

Solicitors for the Preference Shareholders: Messrs. *Iliffe, Russell, & Iliffe.*

Solicitors for the Ordinary Shareholders: Messrs. *Masterman, Hughes, & Co.*

Solicitor for the Trustees: Mr. *Bateman Harcourt.*

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## McKEWAN *v.* SANDERSON.

V.-C. M.
1875
*April* 26, 27.

[1872 M. 198.]

*Liquidation—Composition—Undue Advantage by Creditors.*

A banker holding bills and acceptances as a security for advances made to a customer, took a guarantee from the brother of the customer that the loss of the bank should not exceed £2000. This transaction took place after the customer had commenced proceedings for the liquidation of his affairs, and unknown to his other creditors, with a view to prevent the bank from opposing a composition:—

*Held*, upon a bill filed by the banker to enforce performance of the agreement, that the arrangement, which would have the effect of giving one creditor a secret advantage over the others, could not be sustained, and the bill was dismissed with costs.

MOTION for decree.

This was a bill filed by the public officer of the *London and County Bank* to enforce against the Defendant *George Sanderson* a guarantee given by him to the bank under these circumstances: In May, 1864, *James Sanderson*, the brother of the Defendant, opened an account with the *London and County Bank* at their *Holborn* branch, and in the usual course of business the bank discounted for him and placed to his credit the proceeds of discount of divers bills of exchange, some of which were accepted by *James Sanderson*, and some were drawn or indorsed by him and accepted by other persons. At the end of August and beginning of September, 1870, *James Sanderson* was indebted to the bank in a sum exceeding £6800, against which the bank held acceptances which

V.-C. M. 1875 McKewan v. Sanderson.

they had discounted for *James Sanderson* to about the amount of his debt. *James Sanderson* was then in difficulties, and proposed to make some arrangement with his creditors by way of liquidation, and on the 28th of July, 1870, he filed in the Court of Bankruptcy a petition for liquidation or composition. On the 30th of August, 1870, a statement of his affairs was filed in the Court of Bankruptcy, whereby it appeared that the bank were among his creditors. On the 27th of August, 1870, the first meeting of his creditors took place, and notice of such meeting was given to the bank, and Mr. *Garland*, as the representative of the bank, was then present. At that meeting a proposition was made that the creditors should accept 2*s.* 6*d.* in the pound, but Mr. *Garland* declined to accept the proposal, and the bank being the largest creditor of *James Sanderson*, the proposal was not accepted, and the meeting was adjourned to the 7th of September following. On that day the Defendant and his brother applied to the bank to forbear pressing *James Sanderson* into bankruptcy or proving on his estate, and to give time for realizing the acceptances as against other persons liable thereon, upon the terms of a guarantee to be given by the Defendant that the bank should not ultimately lose more than £2000 on *James Sanderson's* account. The bank accepted the proposal, and the Defendant wrote the following letter to the bank:—

"Gentlemen,—Referring to the statement shewing a list of acceptances to the drafts of Mr. *Jas. Sanderson*, and acceptances of Mr. *Jas. Sanderson* to various drafts, amounting in the aggregate to the sum of £7218 1*s.* 4*d.*, under discount with your bank and for various good considerations, I hereby guarantee the bank that the ultimate loss to the bank, in respect of the said acceptances and drafts, shall not amount to more than the sum of £2000. And I hereby undertake to pay to the said bank within nine months from this date such sum as shall be found to be then due to the bank in respect of acceptances and drafts beyond the loss above mentioned, namely, £2000; and I further undertake to sign such further or other guarantee embodying the terms of this guarantee and arrangement, to be settled and approved by our respective solicitors. Signed, *George Sanderson*."

At the date of this guarantee the acceptances discounted for

*James Sanderson* by the bank, and on which he was liable to the bank, amounted to £6896.

In consideration of the guarantee the bank forebore to take proceedings against *James Sanderson*, or to prove against his estate, and at the meeting of creditors, held on the 7th of September, 1870, a proposal to pay 2*s.* in the pound was accepted by a statutory majority of the creditors present, but no one attended the meeting on behalf of the bank, and no intimation was given to the creditors of the secret arrangement entered into between the Defendant and the bank.

In pursuance of this agreement the bank proceeded to realize or compound the acceptances as they arrived at maturity, and at the expiration of nine months the original debt of *James Sanderson* was reduced to the sum of £4867 10*s.* 9*d.*, and the bank then pressed the Defendant for payment of that amount, less the sum of £2000, which was to be the total loss sustained by the bank. No payment was, however, made by the Defendant on account of his guarantee, and this bill was filed praying that the Defendant might be ordered to pay the sum claimed by the bank after deducting the £2000, and that an account might be taken of what was due to the bank upon transactions between the parties, the bank offering to give up to the Defendant all the unsatisfied acceptances still remaining in their hands.

It appeared that in October, 1871, the Plaintiff, as public officer of the bank, commenced an action at law against the Defendant to recover the amount alleged to be due to the bank under or by virtue of the guarantee, and had by the declaration claimed the sum of £3000. The Defendant appeared, and pleaded to the action that the guarantee was made between the bank and himself without the knowledge or consent of the creditors of *James Sanderson*, who were to be bound and affected by the proceedings in bankruptcy, and for the purpose of giving the bank a fraudulent preference over other creditors of *James Sanderson*, contrary to the terms of the statute in such case provided.

The plea was heard on demurrer, on the allegation that it was bad in substance, and judgment was given against the Plaintiff's demurrer and in favour of the Defendant on the plea.

This bill was filed on the 18th of October, 1872, and the Defen-

V.-C M. 1875 McKEWAN v. SANDERSON.

dant having pleaded that the Plaintiff's claim was founded on a contract giving the Plaintiff a fraudulent preference over other creditors, the plea was argued in January, 1873, and the Vice-Chancellor overruled the plea on the ground that it did not aver that proceedings in the liquidation had commenced or were imminent when the guarantee was entered into. See report of *McKewan* v. *Sanderson* (1).

Mr. *Waller*, Q.C., and Mr. *Chubb*, for the Plaintiff:—

This bill seeks to have an arrangement carried out which was entered into by the Defendant for the purchase of certain bills and acceptances held by the Plaintiffs, the *London and County Bank*, as security for a debt owing to them by *James Sanderson*, the brother of the Defendant. *James Sanderson* was a customer of the bank, and had deposited these bills and acceptances with them. In August, 1870, he was in difficulties, and his brother, the Defendant, in order to save him from bankruptcy, offered to purchase from the bank these various securities, which at that time had not become actually due. The bank had full power to sell the securities if they thought fit, and the transaction was a fair and proper one, and such as the Defendant was bound to carry out. This case has nothing to do with the bankruptcy of *James Sanderson*, and it is not in any way governed by the *Bankruptcy Act*. It was a simple purchase of securities, which the bank had a right to sell in the same way that they might have transferred an estate mortgaged to them as a security for money. The bank, having these securities, refused to enter into any compromise in connection with the other creditors of *James Sanderson*, and though the agent of the bank attended the first meeting of the creditors, he withdrew from the meeting and declined to be a party to any composition, considering that the bank had a right to stand upon their securities independently of the other creditors. This case is not affected by the *Bankruptcy Act*, 1869 (32 & 33 Vict. c. 71). The 92nd section of that Act provides that every conveyance or transfer of property, or charge thereon made, every payment made, every obligation incurred, and every judicial proceeding taken or suffered by any person unable to pay his debts, in favour of any creditor, with

(1) Law Rep. 15 Eq. 229.

a view of giving such creditor a preference over the other creditors, shall, if such person shall become bankrupt within three months, be deemed fraudulent and void as against the trustee of the bankrupt; but this section was not to affect the rights of a purchaser, payee, or incumbrancer in good faith and for valuable consideration. *James Sanderson* did none of the things included in this section. Long before his bankruptcy he had deposited the bills and acceptances with the bank, and the bank, having reason to suppose that their customer would not pay his debts, sold the securities to a third person, who was in this case the bankrupt's brother; but the transaction has no reference to the fraudulent disposition of property by a bankrupt contemplated by the 92nd section of the Act. That section expressly confines the restriction to transactions between the debtor himself and his creditors, and does not apply to transactions by third parties.

This case is not brought within any of the authorities respecting fraudulent debtors, such as *Jackman* v. *Mitchell* (1), which went upon the broad principle of public policy, or *Mare* v. *Sandford* (2), where there was a fraud upon the other creditors. Here there is no question of public policy, and as to the other creditors they were positively gainers by the transaction. They might have had the whole debt of the bank thrown into the scale against them, and they would have got no dividend whatever out of the bankrupt's estate. Instead of that the bank consented to lose £2000, and the remaining debt was to be purchased up, so that it would never form part of the bankrupt's liabilities: *Robson* on Bankruptcy (3).

Mr. *Glasse*, Q.C., and Mr. *Cottrell*, for the Defendant, cited *Mare* v. *Warner* (4), *Wood* v. *Barker* (5), *Hall* v. *Dyson* (6), and *Murray* v. *Reeves* (7), but were not called upon to address the Court.

Sir R. Malins, V.C.:—

The Plaintiff, Mr. *McKewan*, is the registered public officer of a large and well-known bank, the *London and County Bank*. The

(1) 13 Ves. 581.
(2) 1 Giff. 288.
(3) Page 200.
(4) 3 Giff. 100.
(5) Law Rep. 1 Eq. 139.
(6) 17 Q. B. (N.S.) 785.
(7) 8 B. & C. 421.

V.-C. M. 1875 McKEWAN v. SANDERSON.

Defendant is *George Sanderson*. He is the brother of *James Sanderson*, who, in the year 1870, was in difficulties, so great that he was obliged to take proceedings, or proceedings were taken against him, in bankruptcy. *James Sanderson* appears to carry on the business of a licensed victualler, and also, as is not unfrequently the case with persons in that occupation, a bill discounter, chiefly of bills collected in a particular trade. He had an account with the *London and County Bank, Holborn* branch, and had deposited with them bills to a large amount—that is, £6800. Some of these bills were accepted by himself; of some he was the drawer, and of some he was the indorser. Nothing can be more clear than that, inasmuch as there was no debt due to the bank except for these bills, if all had been good bills the bank would have been covered by them, and they would never have become creditors of *James Sanderson* at all; but the bank were perfectly well aware that these bills were what bankers would call "a very bad lot." Therefore they knew that they must look to *James Sanderson*, their customer, to pay them any deficiency of the amount they would require under the bills.

In this state of things a meeting of the creditors of *James Sanderson* was called and held on the 27th of August, 1870. The bank, I understand, were unquestionably the largest creditors, and, as the largest creditors, they, by the manager of the *Holborn* branch, Mr. *Garland*, attended the meeting of that day. The proposal which was then made was, that *James Sanderson* should pay a dividend of 2*s.* 6*d.* in the pound. That the bank would not accede to. They cannot in the slightest degree be blamed, nor could any other creditor, for not assenting to such a proposal: but it seems it was well understood that if that dividend was paid and accepted, the Defendant, *George Sanderson*, the brother of *James*, was to find the money. The meeting, therefore, was adjourned to a subsequent day, the 7th of September. I must assume, and do assume—and it is not attempted to be denied—that if it had not been for what took place on the 7th of September the bank would have attended the second meeting, and been present on that occasion either to accede to that proposal which was then made, or to refuse it, or to resolve upon taking further proceedings in bankruptcy. Then, why did they not attend the second meeting of the

7th of September? Because it appears, not only by the statement of the Plaintiff, but by their own evidence, that in the course of the morning of that day, before the hour of the meeting, Mr. *Garland* was waited upon by the debtor, *James Sanderson*, and by the Defendant, *George Sanderson*, who made a proposal that if they would stay away from the meeting and take no further proceedings against *James Sanderson*, *George Sanderson* would guarantee to them the payment of the full amount of all the bills they held, less £2000—that is, instead of losing, as they might have done, the whole £6800, happen what might they should lose £2000 only; in other words, that he would pay them the whole amount of the bills less £2000. That guarantee which was given by *George Sanderson*, is set out in the bill, and dated the 7th of September, 1870, and is in these words:—[His Honour read the letter of guarantee.] Then there is a very long list of bills, amounting to the sum of £6800 and a fraction. Nine months were to be given by the arrangement. Letters were then written by *George Sanderson*, the Defendant, to the bank, the effect of which is that they shall not be losers by giving time to the principal debtor. He was a surety, and therefore the ordinary rule that creditors giving time to a debtor should not release the surety was agreed to by this correspondence. After this, the time having run out, the bank find that they realize by means of the bills, that is, they receive upon these bills from the acceptors, drawers, or indorsers, all except £4867 10*s.* 9*d.* Suppose this arrangement had not taken place, this is perfectly clear: there was a bankruptcy, and the right of every creditor under a bankruptcy is to prove for the deficiency after he has realized his security. He must realize the security, and when he has done that he must prove as a creditor for the balance. There is a provision in the Act for its being done in a particular manner, but it makes no difference; it comes to the same result, that a creditor must stand as a creditor for the purpose of proof only for that amount that remains due after the securities are realized. If this arrangement had not been made with *George Sanderson*, it is clear, to my mind, beyond possibility of doubt, that the bank would have stood a creditor for £4867 10*s.* 9*d.*, that being the amount which they state in their own bill remained due to them after all the securities were realized. They therefore call upon the De-

V.-C. M. 1875 McKewan v. Sanderson.

fendant, *George Sanderson*, to pay the difference between that and the other sum, because they had agreed to lose £2000; and therefore, as they were the losers of £4800, he was to pay the difference between £2000 and that amount, namely, £2867 10*s.* 9*d.*

It is not necessary to say anything about the conduct of *George Sanderson*. I do not admire the conduct of a man who enters into a pecuniary arrangement of this kind and then repudiates it under technical objections of law. Coming to the conclusion I do against the Plaintiff, it is not from any admiration of the proceedings of the Defendant; but as the Vice-Chancellor *Stuart* said, in *Mare* v. *Sandford* (1), he decided the case, not upon the merits of the Plaintiff, but the demerits of the Defendant; so I say here, not upon the merits of the Defendant, but on the demerits of the Plaintiff, I come to the conclusion I do.

Now I take it to be thoroughly settled, both in Courts of Law and Equity, that where there is a bankruptcy, or an arrangement with creditors by composition or insolvency, when insolvency exists as contradistinguished from bankruptcy, it is the duty of all creditors who have once taken part in the proceedings of bankruptcy or composition to stand to share and share alike. Equality is the only principle that can be applied, and if one creditor, unknown to the other creditors—not unknown to one or two, but to the general body—enters into an arrangement by which he gets for himself from the debtor, or from any one on behalf of the debtor, any collateral advantage whatever, that is a fraud upon the other creditors; and, although the money may have been paid, this Court will enforce its repayment. This is in conformity with the decision of Lord *Eldon* in *Jackman* v. *Mitchell* (2), where he says: "The decree in the first case must therefore be, that this bond shall be delivered up to be cancelled. The other bill must be dismissed; and the decree must be made with costs in both causes; though *Jackman* was a party, as in these cases, which proceed upon grounds of public policy, the relief is given on account, not of the individual, but of the public."

That principle cannot be too well understood. I am sorry to find it is not better understood; and I hope this will be a lesson to bankers, whether joint stock or private bankers, that where

(1) 1 Giff. 288. 5 Jur. N.S. 1339 (2) 13 Ves. 581, 587.

there is once a bankruptcy of a customer, they are not to stipulate for a private advantage to themselves, but must stand with the other creditors and participate equally with them.

It has been attempted to distinguish this case from *Jackman* v. *Mitchell* (1), and it is said that this is not a composition, and is not the giving of an advantage to one creditor over the other, but that it is the creditor selling the bills; and if the case could be brought to that, I quite agree that if the bank, without communication with the debtor, or any one on behalf of the debtor, had, on the 7th of September, said, "We will have nothing to do with the bankruptcy of *James Sanderson;* here are certain bills, what will you give us for them?"—if that had been said to a perfectly indifferent individual, they might have sold them for whatever they could get, and might have refrained from taking part in the bankruptcy proceedings. But directly you find it is a suggestion of the bankrupt himself, or somebody on behalf of the bankrupt, it brings the case within this rule—that it is an arrangement unknown to the creditors at large, by which the one creditor stipulates for a benefit to himself which the other creditors do not get. The case cannot be better put than it is put, I think, by Vice-Chancellor *Stuart* in the case of *Mare* v. *Sandford* (2). It was very carefully considered by him. Mr. *Mare* was a bankrupt who had failed for a million of money; and he entered into an arrangement by which he agreed to pay a particular creditor 20*s.* in the pound, while the other creditors were only getting 5*s.* This was concealed from the other creditors; and this transaction with the *London and County Bank* was concealed from the other creditors, because that which is not disclosed is concealed; and if there had been no concealment, if the manager of the bank had gone to the meeting of the 7th of September, and said, "We take no further part, for we have entered into an arrangement with the bankrupt's brother to have 10*s.* in the pound," can anybody believe that the general creditors would have acquiesced in that? Not to tell them was to conceal it; and to conceal it was, in my opinion (not to use harsh terms), a total misapprehension of the rights of creditors *inter se.* In the case I am referring to, it was concealed after the bankruptcy of *Mare,* and he was sued upon the bill. He instituted a suit praying that a certain bill of exchange might be declared to be illegal

(1) 13 Ves. 581. (2) 1 Giff. 288.

V.-C. M. 1875 McKewan v. Sanderson.

and void in the hands of the Defendant; "and, secondly, that the Defendants might be ordered to enter up satisfaction of the judgment for £408 11s., which was signed by him on the 8th of September, 1857." The Vice-Chancellor said (1): "I am sorry that a case of this kind should come before the Court, because neither the Plaintiff nor the Defendant makes a good figure. They made a secret underhand bargain, by which the Defendant gained a greater advantage than the other creditors of the Plaintiff under the bankruptcy, and the Plaintiff, after gaining the advantage of that underhand bargain, has come to this Court to have it set aside on the ground of its illegality." There is some excuse in this case for the *London and County Bank*. They were misled by their advisers on that occasion, who persuaded them that this amounted only to a sale of the bills of exchange or promissory notes. If that had been the simple transaction, without communication with the bankrupt, or anybody on his behalf, that might have been sustained; but directly you find that there is an arrangement to accept a greater advantage, by which the position of one creditor as regards the other creditors is altered, then the case assumes a different character; and whether that is done by being invited to attend a meeting, or to refrain from attending a meeting, is precisely the same. I am warranted in that by the language of Vice-Chancellor *Stuart* when he says (2): "All such secret arrangements, therefore, are utterly void. They cannot be enforced even against the debtor himself, and money paid under them may be recovered back, as having been obtained against the clear principles of public policy." I should say that the Vice-Chancellor reads that from Mr. *Adam's* book, but he adopts it as the basis of his own judgment. Therefore all the Courts of Law and Equity perfectly agree on this subject, that if there be any kind of arrangement whatever with one creditor apart from the others, and not communicated to the others, which influences them to accept a composition which otherwise they would not have accepted, that is a corrupt transaction, and vitiates the whole arrangement; and if that creditor obtains an advantage, this Court will compel him to restore what he has received.

Mr. *Glasse* drew my attention to the case of *Hall* v. *Dyson* (3). That is precisely similar to this. Here the bank had attended

(1) 1 Giff. 294. (2) 1 Giff. 295. (3) 17 Q. B. (N.S.) 785.

the first meeting; they had given notice of opposition by refusing to accept the 2*s.* 6*d.* in the pound, and therefore it comes within this rule: "An agreement by the attorney of an insolvent with one of the creditors, who has given notice of opposition to the insolvent's discharge, to pay such creditor a certain sum of money in consideration that he will withdraw his opposition, is void; such consideration being contrary to the policy of the *Insolvent Debtors Act*, and a fraud upon the other creditors. Although it do not appear that the money is to be paid out of the insolvent's funds" (1). Then Lord *Campbell* in giving judgment says: "This rule must be made absolute. There is no doubt that the Plaintiff might have withdrawn his opposition, if he chose, but he had no right to agree to do so in consideration of receiving money." And further on he says: "In the present case, the creditor is, as it were, bought off; he was under a moral obligation to continue his opposition, inasmuch as by giving notice of it, he had led the other creditors to believe that he really intended to oppose. The consequence of his withdrawing is that justice is disappointed, because the adjudication is made without the proper investigation having taken place. It seems to me that the consideration for receiving the money, which is, to withdraw his opposition, and that, after having given notice of it, is clearly immoral."

Now, the result of this transaction is this: that while all the other creditors have had only 2*s.* in the pound, the bank will have had more than 10*s.* if they succeed in their claim, for they call upon the Defendant to pay £2867 out of the £4867. Therefore they are "bought off," as Lord *Campbell* said; that is, they were induced not to attend that meeting, when they ought to have gone and continued the opposition for the benefit of the other creditors and themselves, and to have promoted equality among them all, whether by payment of a dividend by the brother, or out of the assets of the bankrupt's estate. It was incumbent upon them to continue the proceedings they had taken to enable that equality to be made. What is the result? That they are to get 11*s.* or 12*s.* in the pound, because they were bought off or induced not to attend the second meeting. If the Defendant, *George Sanderson*, could afford to pay £2867 for his brother's creditors, he ought to have paid it for the benefit of all the creditors. It was an unfair

(1) 17 Q. B. (N.S.) 785.

V.-C. M. 1875 McKewan v. Sanderson.

transaction on his part to give a preference to the bank, because he thought they were powerful and could bring about some collateral arrangement.

Upon all these grounds it is perfectly impossible on this bill that the bank can succeed upon this guarantee, it being opposed to all public policy, and therefore the bill must be dismissed.

Although the Vice-Chancellor *Stuart*, in *Mare* v. *Sandford* (1), dismissed the bill with costs, in a subsequent case some doubt was expressed upon that subject. I am sorry that the officers of the *London and County Bank* should have acted in this way. I think they have committed a great error, and they will know better in future if my judgment stands. The bill must be dismissed. I have, however, so little admiration for the conduct of Mr. *George Sanderson*, that I think it must be dismissed without costs.

Mr. *Glasse*:—This is a different case from *Mare* v. *Sandford*, because the whole of this question might have been decided at law. Having gone on at law to a certain point, they stop those proceedings, and doubly vex us by afterwards coming to this Court. In *Wood* v. *Barker* (2), where the Plaintiff sought to set aside a secret bargain, the Vice-Chancellor considered that on the ground of public policy the Defendant ought to pay the whole costs of the suit.

The Vice-Chancellor:—I think, considering this is a bank, they were bound to know, or if they did not know, to have ascertained before filing this bill, that such transactions must be discountenanced by a Court of Equity. They tried their case at law, but it is quite plain why they stopped that case. The Judges gave as strong an opinion against the transaction as I have given now. They saw no prospect of success at law, and now they try their hands in equity. They have committed an error, and under the circumstances, and more particularly on the ground of the proceedings at law, I come to the conclusion that the bill must be dismissed with costs.

Solicitors for the Plaintiffs: Messrs. *Deane, Chubb, & Co.*

Solicitor for the Defendant: Mr. *J. S. Miller.*

(1) 1 Giff. 288. (2) Law Rep. 1 Eq. 139.

## DELVES *v.* DELVES.

V.-C. M.

1875

*March* 6, 20.

[1872 D. 190.]

*Sale by Auction—Opening Biddings—Misconduct in the Management of the Sale—30 & 31 Vict. c.* 48.

In order to entitle parties to open the biddings after a sale by auction under the Court since the passing of the *Sales of Land by Auction Act*, 1867, there must be either fraud or such misconduct as borders on fraud.

Consideration of the circumstances necessary to justify the presumption of such misconduct.

THIS was a summons seeking to open the biddings on a sale by auction on the 16th of April, 1874, in pursuance of an order made in the suit on the 4th of August, 1873, so far as related to the property put up as Lot 6 at the sale, on the ground of misconduct in carrying out the sale.

The suit was instituted by beneficiaries under the will of a testator, *Joshua Delves*, against the trustees and other parties.

The order was for the sale of the real estate of the testator, *Joshua Delves*, and the property was put up in six lots. As to Lots 3, 4, and 5, the bidding did not reach the reserved prices. Lots 1 and 2 consisted of certain house property at *Tunbridge Wells*, and Lot 6 of a farm of 112 acres at *Rotherfield*, in *Kent*, called the *Whitehouse Farm*, partly of freehold and partly of copyhold tenure. The farm was almost surrounded by property belonging to the Earl of *Abergavenny*, and was subject to his rights of free warren and free chase. Mr. *William Delves*, the land agent of the Earl, and his son, Mr. *W. H. Delves*, were the trustees of the estate, and the beneficiaries were the first cousins of the former.

Mr. *William Delves* took an active part in carrying out the order for sale. He selected the auctioneer, and they together selected a Mr. *Dunn* to assist in making valuations and plans, and they all took part in fixing the reserved prices.

This was done at a meeting on the 24th of February, 1874. There was some little difference in the recollection of the parties as to what took place at the meeting with respect to the valuation of the farm. The price ultimately fixed upon was £3000, but the

V.-C. M. 1875 DELVES v. DELVES.

auctioneer had been inclined to fix it at 3000 guineas; and he stated in evidence that he had had in his mind a still higher figure, the amount of which he was uncertain, but this was not borne out by the recollection of the other parties. The £3000 was arrived at by taking thirty-three years' purchase on an estimated rental of £90 instead of the then actual rental of £65, which was considered too low.

Some days before the auction Mr. *Delves* had had some conversation with the Earl with reference to the desirability of the latter becoming the purchaser, and had expressed the opinion that the value of the farm was about £3000. He however explained that, being trustee of the property, he could not act for the Earl at the sale.

The reserved price of £3000 was adopted by the Court, and a sealed envelope inclosing it, with proper directions as to opening it printed on the outside, was forwarded to the auctioneer by the Chief Clerk.

The day before the sale a Mr. *Wray* called upon the auctioneer and stated that he intended to go to the sale, and was prepared to bid for the farm up to £4000, but on the day of the sale he again went to him, and stated that he had heard that the Earl intended to buy the property at any price, and that it was therefore no use for him to bid. It appeared also that Mr. *Delves* had been informed of the statements which Mr. *Wray* had been making.

The sale took place at *Tunbridge Wells*, and on the *Whitehouse Farm* being put up at the auction, Mr. *Streatfield*, the private secretary of the Earl, who had been instructed to act on his behalf at the sale, made a bid of £2500; but though the room was full of people there was no counter bid, and the auctioneer having stated that he could not sell at that price, Mr. *Streatfield* made another bid of £3000. Some minutes then elapsed, during which the auctioneer explained the merits of the estate, but as no further bid was made, it was knocked down to Mr. *Streatfield*, and the Earl became the purchaser at the reserved price.

Mr. *Delves* was present at the sale, but took no part beyond saying, in answer to a question, that the rights of free chase and free warren belonging to the Earl were undoubted, to which one of Mr. *Delves*' sons added that the owner would have concurrent rights.

The farm having been knocked down, Mr. *Delves*, who had money in his hands applicable to the purpose, filled up a cheque for the amount of the deposit.

Though Mr. *Wray* was in *Tunbridge Wells* on the day and at the time of the sale, he did not attend, and he gave as his reason for non-attendance that he was not aware of the change in the law taking away the rights of opening biddings. After the sale he repeated his offer of £4000 for the farm, and some of the parties to the suit becoming aware of this, caused the summons to be taken out by the Plaintiffs' solicitor.

Mr. *Stone*, the country solicitor of the Plaintiffs, having, in cross-examination upon an affidavit, expressed his belief that Mr. *Delves* was as competent to value land as any one in the county of *Sussex*, and having repudiated any imputation of fraud, in answer to the question, "What fraud or improper conduct do you impute in this case?" said, "I impute no fraud or improper conduct, but I leave the Court to judge from the facts before it."

Mr. *Glasse*, Q.C., and Mr. *Rigby*, for the Plaintiffs:—

Mr. *Delves*, being the agent of Lord *Abergavenny*, was disqualified from taking any part in the sale on behalf of the beneficiaries. He had necessarily a bias which might induce him to fix the reserved price unduly low, and the fact that the reserved price was at his instance reduced below the figure estimated by the auctioneer, proves that he was so influenced. But it is not necessary to shew that he was so influenced in order to set aside the sale. It is sufficient to shew that there was a relation between him and the purchaser which might have influenced him: *Ex parte Bennett* (1). The rule that a transaction is avoided altogether if a relation exists between the parties in which their interest conflicts with their duty will be strictly maintained: *Greenlaw* v. *King* (2); and the passing of the *Sales of Land by Auction Act*, 1867, has not affected it: *Guest* v. *Smythe* (3). The discussion of the price with Lord *Abergavenny* is of itself sufficient to avoid the sale: *Ex parte Hughes* (4). If Mr. *Delves* had been in an unbiassed condition, it would have been obvious to him that Lord *Abergavenny* would

(1) 10 Ves. 381.
(2) 3 Beav. 49.
(3) Law Rep. 5 Ch. 551.
(4) 6 Ves. 617.

V.-C. M. 1875 DELVES v. DELVES.

give a higher price than other people, and he would have taken that fact into account in fixing the reserve.

Evidence that the reserved price was inadequate is quite unnecessary. The fact is shewn by the offer made by Mr. *Wray*.

Mr. *W. F. Robinson*, for the Defendants.

Mr. *W. Pearson*, Q.C. (Mr. *Ward* with him), for the Earl of *Abergavenny*, commenced stating his view of the facts of the case, but was stopped by the Court.

SIR R. MALINS, V.C., after stating and commenting on the facts, continued:—

In order to open a bidding it must be established to the satisfaction of the Court that there has been fraud or improper conduct in the management of the sale. I need not trouble myself with the question of fraud here, because that is expressly disclaimed. No imputation is made on Lord *Abergavenny*, Mr. *Delves*, Mr. *Streatfield*, or any one person concerned in the transaction of having been guilty of any fraudulent conduct.

The question, then, is whether there has been any such improper conduct in the management of the sale, as, according to the proper interpretation of the *Sales of Land by Auction Act*, 1867, would justify the opening of the biddings. I cannot help thinking that improper conduct for this purpose must mean something which, although not fraudulent, borders upon fraud. It must imply a contrivance by some of the parties by which the property has been improperly sold. There may be improper conduct which does not amount actually to fraud, yet is in that direction; something that cannot be approved of in the course of the sale.

[Mr. *W. Pearson* referred to a case of *Brown* v. *Oakshott*, which came before the Master of the Rolls on the 27th of July, 1869, as being in accordance with that view.]

My opinion is, in accordance with that case, that in order to justify the opening of the biddings, there must be some impropriety of conduct, not merely error of judgment, which shews that the owners of the estate have not been fairly dealt with, or that

matters have been so contrived that the fair value of the property has not been realized.

Now I find that impropriety of conduct as well as fraud is disclaimed. I must, therefore, look carefully to see what is the conduct of which complaint is made. The first ground of complaint is that Mr. *William Delves*, a gentleman no longer young, and admitted to be a very experienced and able land surveyor, and of perfectly honourable character, who, though not a trustee for sale, had the legal estate in the property vested in him, being a relative of the beneficiaries, who were all his first cousins, acted as a trustee for sale, appointing the auctioneer and surveyor, occupying at the same time the inconsistent position of agent for the intending purchaser. [His Honour then referred to the facts as to the settling of the reserved price, and continued:—]

Mr. *Rigby* says that it is impossible for the Court to dive into human motives, or to tell when a man may be improperly influenced, and that the usual course of the Court is to presume that he was so influenced. The suggestion is that he was more influenced by a desire that Lord *Abergavenny* should get the estate cheaply than that his relatives should get a good price for it. That is a suggestion for which, in my opinion, there is not a particle of foundation or justification. I am satisfied that throughout the transaction Mr. *Delves* acted in a spirit of perfect fairness, and that he intended properly to perform his duty towards the vendors of this estate of fixing the reserved bidding at such a price as should secure it against being sold under its fair value. The proof of this is, that while the property was let at £65 a year—and if he were playing into the hands of Lord *Abergavenny* he might have proposed to take that as the fair criterion of value—he actually took it at £90, which he considered the fair value.

It is my lot sometimes to have to fix reserved biddings, though it is generally done by the Chief Clerk. I think the fair principle to be observed in fixing reserved biddings is to put a moderate price on the property, because if they are fixed at a fancy price which one man in the world only could be induced to give, such as Lord *Abergavenny* might give on account of the situation of his estate, and he does not come forward, all the expense of the auction is thrown away, the parties are disappointed

V. C. M. 1875 DELVES v. DELVES.

in the hope of receiving their money at an early period, and the very fact of the property not being sold at the auction damps future sales.

I am therefore clearly of opinion that it is for the interest of all parties concerned to fix, not a fancy price, but the fair value which the property is worth in the market, so as to secure that the parties interested shall have that price, and that the property shall not be sold otherwise. I think there cannot be a more apt illustration of this than this very case; because it is impossible to say whether Mr. *Streatfield* would have advanced upon the bid of £3000.

Now it is by no means certain that the recommendation of the person employed in fixing the reserved bidding will be sustained by the Court. There was a case in which I increased the reserved bidding very considerably above the sum fixed by the agents employed, even after my Chief Clerk had adopted their recommendation. If I can suppose a thing so dishonourable to Mr. *Streatfield* or to Mr. *Delves*, which I do not, as that Mr. *Delves* had whispered to Mr. *Streatfield* not to go any higher, or that he had bid up to the reserved bidding, the case would have been very different. But that is impossible, because they neither of them knew the reserved bidding.

[His Honour then referred to and commented on the facts relating to the proposal made by Mr. *Wray*, and as to the value of the farm, and after stating his conclusion that the value to any one except Lord *Abergavenny* was not more than £3000, continued:—]

It is said that Mr. *Delves* ought not to have been present at the sale. It may be that it would have been better if he had stayed away altogether. If he had, possibly this dispute might not have arisen. At the same time, if he was there as a spectator, I am at a loss to see what there was in that fact to lead anybody in the auction room to conjecture that Mr. *Streatfield* was bidding on behalf of Mr. *Delves*.

Therefore, under all these circumstances, what is to be done? Here is a case brought forward which can only succeed upon proving fraud or improper conduct in the management of the sale, and the parties were bound to know that they could not succeed

unless they could bring one of those charges home to the parties; and it is a remarkable thing that in such a case as this not one of the parties beneficially interested have put forward a tittle of evidence. [His Honour then referred to the cross-examination of the witnesses, and continued:—]

Therefore, under these circumstances, I am obliged to come to the conclusion that the application which is made for the opening of these biddings has entirely failed, and I am very sorry that the attempt should have been made.

Although it is very important that sales should be properly and honourably conducted, I subscribe most heartily to all that was said by Lord *Eldon* in *Ex parte Hughes* (1), where a factor knew what the reserved bidding was, and became the purchaser by bidding £10 beyond it; and if Mr. *Delves* had been the purchaser here it might have applied. So in *Ex parte Bennett* (2), the commissioner of the bankruptcy whose duty it was to sell the estate became the purchaser.

Therefore, being satisfied that the fair market value was fixed, and fixed in the spirit of honour and fairness by Mr. *Delves* and all concerned in the transaction, and being also satisfied that the auction was fairly conducted on the part of everybody, I dismiss this summons; and, as I am very clearly of opinion that the application ought not to have been made, it must be dismissed with costs.

Solicitors: Messrs. *Collyer-Bristow, Withers, & Russell;* Messrs. *Harting & Sons;* Messrs. *Talbot & Tasker.*

(1) 6 Ves. 617. (2) 10 Ves. 381.

V.-C. B.
1875
*Feb.* 11, 12.

## JOB *v.* POTTON.

[1872 J. 90.]

*Coal Mine—Tenants in Common—License by two only out of three Co-tenants—Rights of third Co-tenant—Acquiescence—Costs.*

It is not destructive waste for a tenant in common of a coal mine to get, or to license another to get, the coals, he, the working tenant, not appropriating to himself more than his share of the proceeds.

The Plaintiff, a tenant in common of a coal mine had notice of a negotiation, which was followed by a lease for three years (in which he did not join) by his two co-tenants, dated in December, 1865, of two undivided thirds of the coal with license to work the coal. Under this license some coal, but considerably less than two-thirds of the whole, was raised, and one-third of the royalty was kept by the licensee for the Plaintiff. A negotiation for a further license was on foot, when, in October, 1872, the Plaintiff filed the bill against his co-tenants and the licensee, praying for an inquiry as to the value of the coals raised; and an account against all the Defendants as trespassers; for an injunction and receiver; and for damages:—

*Held*, that the working was not a trespass; and the Plaintiff electing to dismiss the bill with costs against his co-tenants, decree, without costs, against the licensee for an account of the value at the pit's mouth of the coal raised, less costs of getting and raising, and for payment of one-third to Plaintiff.

## Cause.

In the year 1865 an estate called the *Allsop Estate*, at *Bagillt, Flintshire*, consisting of two separate parts, containing respectively 6A. 3R. 5P. and 1A. 3R. 31P., was vested in the Plaintiff, *Alfred Mortimer Job*, and the Defendants *Maria Potton*, widow, and *John Marriott* and *Caroline Eliza* his wife, in three equal shares as tenants in common in fee, Mr. *Marriott* being seised in right of his wife.

The estate, which had coal under it, was surrounded by a colliery called the *Wern Colliery*, being then and theretofore held and worked by another Defendant, *David Jones*, to such an extent as to preclude the getting of the coal by any one except *Jones*. In 1865 the *Wern Colliery* workings approached the *Allsop* estate, and Mr. *Potton* and Mr. and Mrs. *Marriott* were desirous of making arrangements with *Jones* for working the coal. *Jones* offered to give a royalty on the scale usual in the district, subject to a way-leave of 2*d.* a ton; and on the 9th of March, 1865, *Thomas Roberts*, a mineral surveyor, acting as the agent of Mrs. *Potton* and the *Mar-*

*riotts*, wrote to *Jones* to say that the owners of the land wished him to "go on working," as they were willing to take the same as other landowners got, and that they were preparing an agreement for that purpose.

On the 18th of March the Defendant *Jones* wrote to the Plaintiff, saying he was in a position to work one of the seams of coal in a portion of the land, and asking whether he, the Plaintiff, would allow him to do so, and upon what terms; to which the Plaintiff replied on the 20th of March as follows:—"Mrs. *Potton* applied to me for my consent to work the coal. I wrote her I would do so, in consideration of her giving me an order to receive the amount of her share of royalty, to go to pay the sum of £100 and interest borrowed by her on deposit of her deeds some years since. She does not reply."

On the 21st of March, 1865, *Roberts* wrote to the Plaintiff as follows:—"I have been asked by Mrs. *Potton* and Mrs. *Marriott* to superintend their share of the royalty for coals at *Bagillt*, as I superintend for Dr. *Richardson* and *P. P. Pennant*, Esq., in the same work; and if you will authorize me to look to your interest, I shall feel thankful. Their terms on royalty are 2*s.* 6*d.* per colliers' ton, or the ninth part: it comes to about the same. Mrs. *Potton* and Mrs. *Marriott* have agreed to 2*s.* 6*d.* per colliers' ton. Please come to some agreement as soon as possible."

On the 24th of October, the Plaintiff wrote to *Jones* to say he had received no reply from Mrs. *Potton*, and that, should he succeed in bringing her to her senses, he would immediately write and let him (*Jones*) know.

On the 15th of December, 1865, an agreement was made by the Defendants Mrs. *Potton* and the *Marriotts*, to let two undivided third parts of the coals under the *Allsop* estate to the Defendant *Jones* for three years from the 15th of December, 1865, with full powers of working the same, and also the option of renewing the agreement for the term of ten years from the 25th of December, 1868.

The Defendant *Jones* said that under this agreement he drove his level through a small portion of the *Allsop* estate, and during about two years worked one of the seams under the estate to a small extent. This seam had not been previously worked, but other seams had been. The total amount of the royalty, as

V.-C. B. 1875 JOB v. POTTON.

agreed, upon the coals which *Jones* worked during the three years was £98 5*s.* 3*d.*, out of which he reserved for the Plaintiff, whenever he should claim it, the sum of £32 15*s.* 1*d.*, being one-third of the royalty on the coal got, and he also left more than one-third of the coal ungotten.

After the 21st of April, 1868, he ceased working.

On the 2nd of May, 1868, the Plaintiff wrote to the Defendant *Jones* as follows:—"I am informed that you, with others, are taking the coal from under the land of the estate called and known as the *Pottons' Estate* in *Godly's Lane, Bagillt*, in which estate I have an interest of survivorship; this being done by you without my knowledge or consent, I give you notice I repudiate all such workings, and ask you for a statement of what you have taken, and by what authority you have so taken it, so far as you have gone; and so far as you may go, I shall deem it a trespass for which I shall hold you responsible without my consent first had and obtained."

In answer, the Defendant *Jones* wrote to the Plaintiff on the 5th of May, 1868, stating the agreement of the 15th of December, 1865, and adding, "The sums to which they" (Mrs. *Potton* and Mrs. *Marriott*) "have been entitled under this agreement, as per accounts rendered to Mr. *Roberts*, are" [then followed a statement shewing Mrs. *Potton's* share to be £27 15*s.* 4*d.*]. "A third part of the coal has been left in the ground intact for you, which I am in a position to win if desired, but if you prefer it you can share in the royalty to which Mrs. *Potton* and Mrs. *Marriott* have hitherto been entitled, according me permission to win all the coal, and taking your third part in future. I am animated with the desire of acting in a thoroughly impartial way to each of the owners. . . . If the coal be not won now it will probably not be won at all, as I am stripping all the coals surrounding the land, and it will never pay any one to sink pits, &c., for the purpose of winning from estates isolated as yours are, and so small."

On the 6th of May. the Plaintiff wrote to the Defendant *Jones* saying he repudiated in the most positive manner being a consenting party to his taking coal from under the estate; and a correspondence followed, in the course of which the Defendant *Jones* offered to send a return of the coal got, to allow Plaintiff's surveyor to make a survey of the workings, and at once to hand

over a sum equivalent to that paid to Mrs. *Potton;* and stated that in compliance with Plaintiff's request, he had ceased working.

On the 4th of May, 1872, the Plaintiff commenced an action against the Defendant *Jones* in the Lord Mayor's Court for £850 and costs, which action the Defendant *Jones* caused to be removed into the Court of Exchequer, and entered an appearance therein.

On the 15th of October, 1872, the bill was filed by *Job* against Mrs. *Potton,* Mr. and Mrs. *Marriott,* and *David Jones,* stating that the agreement of the 15th of December, 1865, was made without the Plaintiff's consent or knowledge; and alleging that the Plaintiff did not discover the fact that such agreement had been made, or that the Defendant *Jones* was getting the coals until the month of June, 1868; that the Plaintiff remonstrated, and that negotiations for a compromise of the Plaintiff's claim failed; that after three years had expired the Plaintiff supposed that the Defendant *Jones* would not exercise his power of extending his term of working, and would not continue the working, but that in May, 1872, he paid a visit to the estate and discovered that the Defendant *Jones* was just completing a new arrangement with the other Defendants for a letting of the mines to him for a further term of ten years; that injury had been done to the surface, and a cottage and other buildings thereon sunk and cracked; and that the acts committed by the Defendants amounted to destructive waste.

The bill prayed for an inquiry as to the value of the coals gotten by the Defendant *Jones* under the hereditaments, no deduction being allowed for the cost of bringing them to the surface, and that a sum equal to one-third of such value be ordered to be paid to the Plaintiff; further, for an account of the quantity of the coals left unworked (excluding the quantity which would be left in a proper course of mining), and of the value of such quantity, and that a sum equal to one-third of such value might be paid by the Defendants, or some of them, to the Plaintiff, the Plaintiff undertaking to give to each of the other Defendants her or his share in the coals left; and for an injunction, a receiver, and damages.

The Defendant *Jones,* by his answer, said the value of the coal under the hereditaments was, in his judgment, about £450. He believed the Plaintiff was informed long before June, 1868, by Mr. *Roberts* that the Defendant was working the coal. Since the expiration of the three years he had been in treaty for a fresh term

V.-C. B. 1875 JOB v. POTTON.

of three years, in the expectation that the Plaintiff would concur in it, but as he did not the treaty fell through. It was not true that great, or in the result any, injury had been done to the surface by his workings. The injury to the cottages was mainly owing to want of repair; and he had repaired the cottages, and had put them into better condition than before. The acts of the other Defendants, in giving him a license, and his own acts under that license, did not amount to destructive waste, but were the only means by which the coal could be saved. He had never intended, since he received the Plaintiff's notice in May, 1868, to continue the working, whether he might be entitled to do so or not. Finally he pleaded the *Statute of Limitations*, and acquiescence, delay, and laches on the part of the Plaintiff.

In his affidavit in support of the bill the Plaintiff said that he was an equitable mortgagee of Mrs. *Potton's* share for £100. The coals under the estate were, before the wrongful acts of the Defendant, of the value of £10,000, and he now believed them to be of the value of £6000 at least. He had read the statement in the answer of *Jones* that he and Mrs. *Potton* and a Mr. *Roberts* informed him of the negotiations for such agreement, and that such statement was "wholly untrue."

Mr. *Vavasor Powell*, collier, one of the Plaintiff's witnesses, denied that the coal could only be gotten at a profit in connection with the *Wern Colliery*. As to the part said to contain 6A. 3R. 5P., the coal could be got to advantage by independent workings. In his judgment the coal, being seven seams, under the estate was then worth £6420, and was at one time worth £10,000.

There was conflicting evidence on the other side as to the value of the coals, and as to the amount and cause of damage to the buildings.

The letters shewed a negotiation in 1871 between the Plaintiff and *Roberts* for the sale of the Plaintiff's interest, which fell through. In the course of this Mr. *Job*, in a letter dated the 14th of October, 1871, said he would accept an offer of £180 for his share in the estate, in consideration of Mrs. *Potton's* obligation to him being settled at the same time. He further offered, on the 14th of November, 1871, to transfer his mortgage to *Roberts* for £130, an offer which, not being accepted at the time, he afterwards raised to £160.

After the institution of the suit, namely, on the 30th of December, 1874, Mrs. *Potton* died, and the suit was revived against her representative. Mrs. *Marriott* had also died, and the suit had been revived against her heir-at-law.

It was stated at the bar that since the institution of the suit a decree for the partition of the estate had been made in another suit in this branch of the Court, and that a sale was in progress.

Mr. *W. Pearson*, Q.C., and Mr. *Simmonds*, for the Plaintiff:—

The statute of the 4 Anne, c. 16, by the 27th section, enables an action of account to be brought by one tenant in common against another. In *Wilkinson* v. *Haygarth* (1), where (as we say is the case here) the act of waste amounted to destruction—to a declaration in trespass, it was pleaded that the close was the close of *W.* and others as joint tenants, and justification was pleaded of license from *W.*; but this was held a bad plea, for that *W.* could not himself have done the act, and therefore could not authorize another to do it. So in *Stedman* v. *Smith* (2), where there was actual ouster, Lord *Campbell* said that one tenant in common might maintain trespass against another. Following these Common Law rules, a Court of Equity will, in cases of destructive waste, or where the actual substance of the inheritance has been abstracted, make a decree for an account at the suit of a tenant in common; *Clegg* v. *Clegg* (3).

As to the form of the account, it is settled in *Llynvi Company* v. *Brogden* (4), where all the previous authorities are cited, that the Plaintiff is entitled to the value of the coal at the pit's mouth, less only the cost of raising to the surface.

The Plaintiff is entitled also to an injunction. If a defendant has once committed waste, it is not enough to say he is not going to do so again. The Defendant *Jones* says, indeed, that in negotiating for a new license, he intended to apply for the Plaintiff's consent; but there is no evidence of any such application. A tenant in common may restrain a sale by his co-tenant.

Then the Plaintiff is further entitled to an inquiry as to the damage, if any, occasioned by improper working; and as to the damage, if any, of a permanent character, to the surface. Other-

(1) 12 Q. B. 837.
(2) 8 E. & B. 1.
(3) 3 Giff. 322, 336.
(4) Law Rep. 11 Eq. 188.

V.-C. B. 1875 JOB v. POTTON.

wise, if the damage has been only in a proper course of management, in which case the tenant only has to be indemnified. The inquiry as to damages must be against all the Defendants, who are all wrongdoers.

Mr. *Kay*, Q.C., and Mr. *Alexander*, for the representative of Mrs. *Potton*:—

The theory of the bill is that we are trespassers. This is a mistaken view of the law. We are owners, enjoying our property in the only way in which it can be enjoyed.

An injunction even to stay the cutting of timber will not lie at the suit of one tenant in common against another: *Goodwyn* v. *Spray* (1); *Smallman* v. *Onions* (2); if the waste be not malicious: *Hole* v. *Thomas* (3); *Twort* v. *Twort* (4). There is no such thing as ordinary waste between tenants in common; there may be destructive waste, such as cutting timber unseasonably.

The evidence shews that this is an open mine, that it is wholly surrounded by the *Wern Colliery*, that, if not mined before the *Wern Colliery* is worked out, it never can be worked at a profit; and that *Jones* was ready to give as large a royalty as anybody else. Further, that the Plaintiff knew of the negotiation, and held out only in order to put pressure upon Mrs. *Potton*.

What possible right has the Plaintiff against the co-owners or against *Jones*, neither of whom has committed a trespass? Owners are not trespassers. In the course of the discussion in *Wilkinson* v. *Haygarth* (5), it was admitted that a license puts the licensee in the position of the licensing tenant in common; in other words, that a licensee who does what a tenant in common may lawfully do, is not a trespasser.

Mrs. *Potton* did not receive more than her share of the property; hence the bill cannot lie against her, even for an account; and it equally fails against the other Defendants.

There is no paragraph in the prayer asking for an account of profits.

Mr. *Williamson*, for *John Marriott*.

Mr. *Hervey*, for the heir of Mrs. *Marriott*.

(1) 2 Dick. 667.
(2) 3 Bro. C. C. 621.
(3) 7 Ves. 589.
(4) 16 Ibid. 128.
(5) 12 Q. B. 842-843.

Mr. *Little*, Q.C., and Mr. *Hemming*, for the Defendant *Jones* :—

The Plaintiff, who says he values the coals under this estate at £10,000, has shewn his sense of this estimate by agreeing to take £180 for his share in them. This shews the suit to be speculative, and not *bonâ fide*.

The case of all the Defendants is alike, the acts of the licensee being in law the acts of the co-tenants.

It has been said that a co-tenant cannot deal with the common estate in the way of working. But *Wilkinson* v. *Haygarth* (1), it will be observed, was a case of actual spoliation. Not merely the crop, but the turf that produced the crop, was taken.

[The VICE-CHANCELLOR :—It does not appear that there was anything valuable on the land except the turf.]

Lord *Eldon*, in *Hole* v. *Thomas* (2), said he never knew of an injunction being obtained by one co-tenant against another for waste, though for malicious injury there might be ground. This was followed in *Arthur* v. *Lamb* (3) ; and in *Bailey* v. *Hobson* (4) Lord Justice *Giffard* refused to interfere with the Defendant who was in occupation, not as tenant, of an estate which had been ordered to be partitioned, and who was selling hay and turnips off the land, contrary to an alleged local custom.

The injunction now prayed for is to restrain working in mines which are already open and have been partly worked. The evidence shews that the surface damage has been repaired.

Why did not the Plaintiff come in 1868, instead of waiting till 1872?

Even if this were a case of destructive waste, the Plaintiff would not be entitled to the relief asked. He would have been entitled to an injunction, and to have damages for the coal we had got. The question would have been, what was the measure of those damages? In case of a wilfully wrongful taking the penalty would have been severe.

[The VICE-CHANCELLOR :—If the acts had approached larceny, he would have been entitled to no allowance whatever.]

In a case where the man who has inadvertently taken the coals

(1) 12 Q. B. 837.
(2) 7 Ves. 589.
(3) 2 Dr. & Sm. 428.
(4) Law Rep. 5 Ch. 180.

V.-C. B. 1875 JOB v. POTTON.

believed he had a good title, the measure would be the royalty, and nothing more, in this case £32 15*s.* 1*d.* Even then the Plaintiff's right to recover would have been only by an action at law. If it be admitted on behalf of the Plaintiff that *Jones* has not committed a trespass, how can the Plaintiff have a right to an account?

The Plaintiff has no right at all against *Jones*, who has done only what the co-tenants of the Plaintiff, acting within their right, authorized him to do.

All the Plaintiff can do is to call upon his co-tenants—not upon *Jones*—to account for the Plaintiff's share of their profits of the working, that is, for one-third of the royalty; and this has, in fact, been set apart for him. It would be otherwise if there were destructive waste; and whether this was destructive waste is the sole question. If it was not, the bill must be dismissed. And it clearly was not.

Destructive waste is not the mere taking of the inheritance, it means taking it unseasonably or improperly. Here there has been no destructive waste; there has been a realization of the property, not only in the most economical, but in the only possible way with a view to benefit. Mr. *Job* and his own witness, Mr. *Vavasor Powell*, contradict one another as to this.

The bill was filed more than six years after the agreement of December, 1865.

Mr. *Pearson*, in reply:—

It is not the fact that any of these seams were open at the beginning of *Jones'* working; and there are still some unopened seams. The agreement was a license only, it did not amount to a lease of the Defendants' shares.

As to the statute, we are entitled to an account distinguishing between what they received before the six years and since. In *Duke of Leeds* v. *Earl of Amherst* (1) a remainderman coming within twenty years after he became entitled in tail was allowed to complain of an act of equitable waste committed thirty-eight years before the filing of the bill.

There is no averment here that the coal can only be worked in this manner.

(1) 2 Ph. 117.

As to the accounts prayed, we are content to take an account against *Jones* only.

SIR JAMES BACON, V.C.:—

This is at least a very remarkable suit, whether the nature of it is considered, or the subject to which it relates. It is a suit in the Court of Chancery. I have nothing to do with the common law doctrine, so much insisted upon by Mr. *Pearson*, not only from the nature of the suit, but because the suit has been brought in this Court, the Plaintiff having deliberately elected to prefer the remedy which he can get here to any right or remedy he might have at law. I have, therefore, only to consider the facts as far as they are clearly in evidence, and to consider what are the rights of tenants in common in a mine.

Now, no authority has been referred to, and I believe none can be found, to say that the rights of tenants in common in a mine are not as extensive as can be suggested for each of those tenants to do what he wills with the undivided property, provided always that he does not take more than his share. The statute of *Anne* has recognised that principle, and every decision which I know of has adopted it as a principle. What difference is there between a tree growing, which the Court refuses to prevent a tenant in common from cutting at his pleasure, although it is a part of the inheritance, and a tree which by some operation of nature has become carbonised and turned into cannel coal? How is a tenant in common to enjoy his share (if that is the right expression) of the common property in a coal mine, if he is not at liberty to dig and carry away the coal? The only restriction upon him is that he must not appropriate to himself more than his share. It is not suggested here that the original Defendants, Mrs. *Potton* and Mr. and Mrs. *Marriott*, who were then the co-owners, have taken any more than their respective shares. There is no suggestion of it anywhere. The document which has been referred to, and which is called their license to work, carefully restricts the license which they give within the bounds of their own rights, and there is no difference in that respect between that which Mr. *Jones* has done under their license, and that which they, without license, might have done by their own hands. The principle of the case is, therefore, perfectly clear, and is not disputed. The Plaintiff is

V.-C. B. 1875 JOB v. POTTON.

tenant in common with two other persons in a mine, the shares in which are undivided. They have only exercised their rights, and they have left him, for anything that I can see, to exercise his. What he complains of is, that, under their leave and license, a certain quantity of coal has been taken away in which, to the extent of a third, he is interested; and that seems to be so. But that is the whole of his case—that is, the whole of the right to relief which the Plaintiff can insist upon—and that right to relief must be governed by the facts in this case. The cause has been brought on for hearing after a decree for partition has been made in another suit, from the day of the date of which decree it must be considered that the estate has been divided into three parts, one of which belongs to the Plaintiff. What bearing, therefore, those common law cases, on which Mr. *Pearson* has so strongly insisted, can have on the equitable relief to which the Plaintiff is entitled in this Court, I am unable to perceive in any degree.

The case of *Wilkinson* v. *Haygarth* (1), which has been referred to, touches the question of leave and license, and the sublime mysteries of special pleading, the days of which are numbered. In the decision of the Court there, it was held that the plea was a bad plea, because the plea was of the leave and license of only two persons, when the leave and license of more than two, perhaps of three of them, was necessary in order to justify the plea. That was the whole decision in that case; it decides nothing else in the world, and does not touch the substance of this case, nor even the substance of that case in any degree; but it decided, as a matter of special pleading, that that plea was a bad plea. This mysterious doctrine of leave and license has been very often thrust upon this Court upon the authority of cases in the Courts of Common Law, of which I speak with all possible respect, not with less respect than I do of the case to which the late Lord Justice *Knight Bruce* was not unfrequently in the habit of referring when he was invited to consider the question of leave and license, and the imperfections which might attend it. He quoted a case, the name of which I do not know, which he often cited either from the Year Books, or some not very much less remote reports, a case of a young woman who by her next friend sued a barber for having cut her hair. He was to cut her hair, and he had cut it all off,

(1) 12 Q. B. 837.

and she brought an action against him by her next friend; and the barber pleaded leave and license. The next friend replied that the person he represented was an infant at the time, and could not give leave and license, and so the Court held that the plea was a bad plea, and judgment went for the next friend. That is the most remarkable case of leave and license that I recollect at this moment, but it was quite as much to the purpose as the case upon which Mr. *Pearson* has so much relied.

But to leave all such considerations, let us see what is the case here pleaded and proved. The Plaintiff's case is that he is the owner of an undivided third of the lands in question. His allegation is that "by an agreement, dated the 15th day of December, 1865, the Defendants, *Maria Potton*, *John Marriott*, and *Caroline Eliza* his wife, without the consent or knowledge of the Plaintiff, and without any previous notice to him, agreed to let two equal undivided third parts." The evidence upon that subject is that of Mr. *Roberts*, who has not been cross-examined, although there was an opportunity of doing so. In his evidence he proves, and it is uncontradicted, that on the 21st of March, 1865, he wrote to the Plaintiff this letter:—[His Honour read the letter extracted above, and continued:—] The Plaintiff, in his affidavit, does not repeat that paragraph, which I have read from his bill, but he does state that he did not discover that the agreement had been made until the month of June, 1868. He says he has read the statement in the answer of *David Jones*, that he and the said *Maria Potton* and a Mr. *Roberts*, a surveyor, informed him of the negotiations for such agreement, that that statement was "wholly untrue." That is the way that piece of evidence is met, and upon that, in my opinion, taking into consideration what Mr. *Roberts* states elsewhere, Mr. *Roberts* must be taken to have told the truth, and the Court must act upon it as a fact, that, either at the time or before the agreement of 1865 was entered into, the Plaintiff was fully apprised of it. It is not necessary to go far to find satisfactory proof of that, because the correspondence, which is verified by Mr. *Jones'* affidavit, shews clearly that the Plaintiff was perfectly acquainted with everything that had been done under the agreement. There is a letter of a later date, in which his share of the royalty is stated to him as being equal to that of Mrs. *Potton*, and of the third party, and that the money has

V.-C. B. 1875 JOB v. POTTON.

been at his command ever since. The bill states in the fourth paragraph that the Plaintiff did not discover the fact that the agreement had been made until on or about June, 1868; and then comes this statement in the fifth paragraph of the bill, of which there is not one particle of evidence: "After discovering the conduct of the Defendants in leasing and working the said minerals, the Plaintiff remonstrated with the Defendant *David Jones*, and threatened to take proceedings against the Defendants in respect thereof, and thereupon negotiations took place for a compromise of the Plaintiff's claims, but such negotiations failed." He further alleges that he "paid a visit to the said hereditaments in the month of May, 1872, and upon the occasion of the said visit the Plaintiff discovered, to his great surprise, that the Defendant *David Jones* was just completing a new arrangement with the other Defendants for a letting of the said mines and minerals for a further term of ten years." This is also plainly disproved. It is not true that any working has been carried on after the termination of the agreement for three years from 1865. It is true that there was a negotiation pending at an early time, but it is equally true that there was nothing done upon that negotiation, and that because of the Plaintiff's declining to be a party to it. And is there anything in the case but this, that the Plaintiff, knowing very well that his two co-tenants were working the mine—for Mr. *Jones*' working is only their working—takes no step, remonstrates in no way, not only does not apply to this Court, but does not apply to any other Court, does not offer the slightest objection to what was being done during these three years, and now by his bill comes and asks that Mr. *Jones*, who has been only the agent of the real owners, should be charged with the share of profits that might have been made by working this colliery? If he is entitled to anything, it can only be from the day when a decree is pronounced; he can be entitled to nothing else. A person who has been standing by all this time may take his account—it is indifferent from what period he takes it—he may take the account from 1868. I think he is entitled to such an account, but I think he is entitled to no more; and I think, with respect to any costs of the suit, it would be in the highest degree unjust if I made Mr. *Jones* pay any costs of this suit; although, as I have said, he is answerable for such share as the Plaintiff may be enabled to establish, by means of an

inquiry, to be due to him; and, if the Plaintiff insists upon it, I will direct such an inquiry at his instance and at his risk.

Upon this subject I must say that in directing that account I cannot adopt either of the rules which have been referred to in the decided cases, because this case does not resemble in its substance, elements, or nature, either of the cases to which those varying rules were applied. If a wrongdoer does an act which, if it were the case of a chattel, and capable of sustaining an indictment, would amount to larceny—then the most rigorous mode of taking the accounts is that which is adopted against him. If it has been by inadvertence, or by negligence, not culpable or tortious in any other sense—then the Plaintiff is entitled to the value of the coal at the pit's mouth, allowing nothing for the mere severance, but allowing for the transport of the coal to the pit's mouth. But this is not a case in the slightest degree falling within this principle. This is a case in which, if the coal had been severed by the two co-tenants, and brought by them to the surface and then disposed of, they would have been entitled to deduct from the value, in account with their co-tenants, the cost of severance and the cost of bringing it to the pit's mouth. Mr. *Jones* is precisely in that position now. Mr. *Jones* has done nothing tortious, neither larcenous nor negligent, but in the assertion, and, as I conceive, in the exercise of a strict right, has brought this coal to the surface —has accounted to the two co-tenants for what he and they agreed was its value; and he is accountable to the Plaintiff for what shall appear to be its value, but subject to those deductions. That, in my opinion, disposes of the whole of the case. I do not want to travel into the subtleties which I have listened to, not without interest, from Mr. *Pearson*, but which, in my judgment, have nothing whatever to do with this case, which is to be decided and dealt with in a Court of Equity. Here, all that the co-tenants have done has been to take and enjoy that which was unquestionably theirs, although it was at that time undivided. If anybody will point out to me the way in which a co-tenant of a mine could enjoy that which is his, by any other means than that which was adopted here, I will listen to it with the greatest pleasure, and change my opinion. The conduct of the Plaintiff has been, in my opinion, certainly without any explanation, and, as I think, with-

V.-C. B. 1875 JOB v. POTTON.

out excuse. It is also clear that the Plaintiff, who now files a bill alleging the large value of this property, and attempts to prove by his witness that the coal under it was worth £10,000, and is now worth £6000, was ready to sell it for £180; and I cannot add the £160 to make up the price—it was a totally different transaction. The Plaintiff said to Mrs. *Potton*, "Your husband owed me £160; if you will pay me your debt, I will sell my mine for £180." That is not selling "my mine" for £340; it is a plain unqualified suggestion, as far as it goes, that the £180 was the whole value to a purchaser of the thing which Mr. *Job* had to sell at that time.

To the proceedings in the Common Law Courts I have already adverted. In the proceedings in this Court there has been no application for an injunction; and no such application could at any time have been successful. That there can be none now is obvious, because there has been a decree in a partition suit; but if the present Plaintiff—I suppose a defendant in that suit—had any such case as he suggests upon this record, I ask why he did not bring that forward in the partition suit, and say, "In making a decree for partition, you must take into consideration that my other two co-owners carried away a part of the inheritance."

[Mr. *Pearson* observed that the point was very strenuously argued.]

I suppose then that I thought there was no proof of the fact. However, that is all over, and it has very little to do with the present case. All I can do in this case is to deal with this record. I find persons made parties to the suit whom the Plaintiff says it was necessary for his interest to make parties to it. Very well, as he says so, and as they make no claim, as they, in my judgment, or the persons they represent, have done nothing which they were not entitled to do, as no account is asked against them at the bar, and they are not accountable, in my opinion, the Plaintiff must pay their costs of the suit up to the hearing, and, if he likes, they may then be dismissed. All the decree can do besides, is to direct an account of the coal which has been gotten by Mr. *Jones*, of the value of that coal, making to him all just allowances, including especially the cost of severing the coal and the cost of bringing it up to the pit's mouth; and for one-third of that, the Plaintiff, being bound by no agreement, will be entitled to claim payment from Mr. *Jones*. I have already said I shall give no costs against

Mr. *Jones* up to the hearing. The costs afterwards will of necessity be reserved; and although I have not gone into it at any great length, I desire it to be understood that I proceed upon the evidence in the case as it stands, namely, on the one hand, the discrepant evidence between the Plaintiff and Mr. *Vavasor Powell*, and on the other hand, the plain evidence on the part of the Defendant *Jones* and his witness, *Roberts*—a person, from his employment, entitled to be listened to when he is speaking on such a subject as a coal mine, and who, as I have said, has not been cross-examined. But I give him no costs, because, although I do not blame him, he chose to go on without the authority and consent of the Plaintiff. The subsequent costs will of necessity be reserved.

There only remains to be mentioned the subject of the damage which the surface is said to have sustained. On both sides it is agreed that that damage, whatever it was, was occasioned by the working. The working was a lawful thing, and the damage, if done, ought to have been repaired. It is in evidence distinctly not only that such damage was occasioned by the proper working, but that it has been effectually repaired, and that the cottage said to have had a cracked wall is now a better cottage by a great deal than it was before. Upon that subject, therefore, in my opinion, no further observations need be made.

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The following are minutes of the order:—

Inquire what coals have been worked and gotten by the Defendant *David Jones* from the mines under the *Allsop Estate* in the pleadings mentioned, and what was the market value thereof at the pit's mouth, and what were the costs incurred by the said Defendant in getting and severing the coal, and bringing it to the pit's mouth, and deduct the amount of such costs from the amount of such value, and order the Defendant *Jones* to pay to the Plaintiff one-third part of the amount of such value after such deduction; no costs of suit as between the Plaintiff and the Defendant *Jones*;

The Plaintiff electing not to keep the other Defendants before the Court for the purposes of such inquiry, dismiss the bill with costs as to them; but only one set of costs is to be allowed to the Defendants representing each of the two undivided third parts of the estate.

Solicitor for the Plaintiff: Mr. *J. M. Green.*

Solicitors for the respective Defendants: Messrs. *Blake & Snow;* Messrs. *Williamson, Hill, & Co.;* Messrs. *Letts & Co.;* Messrs. *Chester, Urquhart, & Co.*

V.-C. B.
1875
March 5, 6, 9.

## FIRTH *v.* MIDLAND RAILWAY COMPANY.

[1852 F. 107.]

*Specific Performance—Substituted Contract rendered impossible of Performance—Death of Arbitrator—Decree for Performance of Original Contract—Damages—Interest.*

A landowner, through whose land a railway company proposed to pass, agreed in May, 1864, to withdraw his opposition to their bill on the terms that the company would vary the course of their line and make certain bridges, works, and approaches. The company gave a notice to treat, and on the 20th of March, 1867, they went into possession. On the 27th of May a further agreement was come to that the company should pay £2250 for purchase-money and compensation, and should construct the bridges askew according to an agreed plan.

The company constructed the line as agreed upon, but did not complete the works, nor pay the purchase-money, nor the interest, though completion of the works was demanded in July, 1868, and payment of interest in December, 1868.

On the 6th of February, 1869, a substituted agreement was made between the landowner and the company, whereby it was agreed that an estimate should be made by the company's engineer of the cost of completing the road, and submitted to *A.*, the landowner's agent, "for approval; in case of difference the amount to be determined by *B.*;" the amount, "when agreed or determined," to be paid to the landowner, "in discharge of all obligations" as to the road; and "the purchase to be completed forthwith."

In December, 1871, *A.* died; and in May, 1872, the company, for the first time, sent in an estimate for the cost of completing the road. The purchase had not been completed, and neither the purchase-money nor any interest had been paid. *B.* was living:—

*Held*, that the submission of the estimate to *A.* for approval was of the essence of the agreement of the 6th of February, 1869; and that, inasmuch as by his death the agreement was incapable of being performed in the manner and form therein specified, the Court could not enforce performance of it.

Specific performance decreed of the works according to the agreements of 1864 and 1867.

The company were ordered to pay interest on the purchase-money from the date of their taking possession; but no inquiry was directed as to damages.

MOTION for decree.

By an agreement dated the 13th of May, 1864, and made between *John Firth* of the one part, and the *Midland Railway Company* of the other part, it was agreed that a petition about

to be presented by *Firth* to the House of Lords against a bill promoted by the company for making a branch line from *Chesterfield* to *Sheffield* should be withdrawn, on the terms that the company should vary the centre line of the proposed railway according to an annexed plan, and should construct two bridges at right angles to the railway, with proper approaches, "such bridges to be made at such places as shall be designated by Mr. *Marcus Smith* or other the agent of the Duke of *Norfolk* after mentioned," with a further stipulation as follows: "The before-mentioned bridges and approaches to be made to the reasonable satisfaction of Mr. *Marcus Smith*, of *Sheffield*, or in the event of his death, the agent for the time being of the Duke of *Norfolk* in *Sheffield;* and to be completed contemporaneously with the railway."

The proposed bridges were intended to connect parts of a freehold estate belonging to *Firth*, which was about to be severed by the proposed line.

On the 5th of July, 1866, the company served Mr. *Firth* with a notice to treat for 4A. 1R. 25P. of the estate; and on the 20th of March, 1867, the company paid into the bank to the account of the Accountant-General and the credit of *John Firth* the sum of £1068, and delivered to him a bond in a like amount, conditioned for the payment of such purchase-money or compensation as might be determined to be payable by the company, with interest at £5 per cent. from the date of entering into possession until payment.

On the same 20th of March, 1867, the company took possession of the land. They constructed the line, with the variation of centre which had been agreed upon.

By a notice in writing, dated the 17th of May, 1867, signed by *Marcus Smith*, and duly served on the company, *Marcus Smith* designated the places where the bridges should be constructed at right angles to the line, by reference to an accompanying plan.

In order that the bridges might cross the line at right angles it was necessary, or at least more convenient, that the roads should approach the bridges by curves, and the plan shewed these curves, and also shewed the straight courses which the roads would take if the bridges should be built askew instead of at right angles to the line.

V.-C. B.
1875
FIRTH
v.
MIDLAND
RAILWAY CO.

On or about the 27th of May, 1867, an agreement was come to between *Firth* and the company, whereby it was agreed that the company should pay to *Firth* a sum of £2250 as purchase-money and compensation for the land taken by them, and that the two bridges should be constructed askew, according to the plan annexed to the notice of the 17th of May, 1867.

This agreement was constituted by a correspondence, from which it appeared that the company agreed to pay £2750 for the land and severance, and stipulated to receive back £500 for making the bridges askew; and it was agreed that the costs and expenses were to be paid by the company, the amount to be settled, in case of difference, under the Act; and the 1st of August, 1867, was proposed for the completion of the purchase. The formal contract embodying this agreement was never signed.

On the 10th of December, 1867, a second notice, signed by *Marcus Smith*, was served upon the company, stating his opinion that the approaches ought to be properly formed, fenced, sewered, stoned, and completed in all respects in accordance with the bye-laws of the borough of *Sheffield* and the provisions of the *Local Government Act*, 1858.

On the 13th of February, 1868, the company entered into an undertaking, in a suit of *Newbould* v. *Midland Railway Company*, not to interfere, until the hearing of that cause, with a right of way, alleged by *Newbould* and *Rodgers*, the Plaintiffs in that suit, to exist, and which it was said would be interfered with or destroyed by the construction of the more northerly of the skew bridges.

On the 24th of July, 1868, Messrs. *Broomhead & Wightman*, Mr. *Firth's* solicitors, wrote to Messrs. *Beale, Marigold, & Beale*, the company's solicitors, enclosing a plan from Mr. *Marcus Smith*, and shewing two ways in which the company could make the northerly road in accordance with the terms of the Parliamentary agreement, with either of which Mr. *Firth* would be satisfied, and to neither of which they thought the Plaintiffs in *Newbould* v. *Midland Railway Company* could successfully object; and urging that whichever plan was adopted, it should be carried out as quickly as possible.

On the 30th of December, 1868, *Firth's* solicitors wrote to the

company's solicitors, asking for the interest due to Mr. *Firth* on £2250 from the 20th of March, 1867, up to the 20th of December, 1868, namely, £196 17*s.* 6*d.* less income tax.

On the 19th of January, 1869, the company's solicitors wrote to say that the amount of £2250 was agreed to on the footing that the approach roads were to be made as indicated by the notice of the 16th of May, 1867, and that they were commenced until the construction of one of them was stopped by the proceedings in the suit. "It then appeared clear," the writers continued, "that your client was unable to put the company in possession of the site of the old foot-road necessary for the construction of the approaches in accordance with Mr. *Smith's* plan, and on the 24th of July, 1868, you wrote stating the alternative courses . . . . We find that either course of construction will involve a very considerable outlay beyond the cost of the road as originally contemplated. Provided that this additional expense be borne by Mr. *Firth*, the company will agree to whichever mode of construction may be found most convenient . . . . We do not think the company can properly pay interest until these questions are disposed of."

In answer, *Firth's* solicitors observed that the company did not make the approach roads as indicated in the notice of the 17th of May, 1867. The difficulty had arisen from the company departing from the original scheme in order to enable them, for their own convenience, to make use of the foundations of the more northerly of the two bridges. They proposed a meeting for a settlement, and again demanded the payment, without prejudice, of the interest.

On the 6th of February, 1869, an agreement was come to between the respective solicitors in the following terms:—

"The approach from *A.* to *B.* on plan signed by Mr. *Crossley* and Mr. *Marcus Smith* to be completed by the company according to the present arrangements.

"The approach on the south-east side of the railway from *B.* in the direction of *X.* to be neatly trimmed down.

"An estimate to be made by Mr. *Crossley* of the cost of completing the road from *B.* towards *C.*, according to the arrangements existing before Mr. *Newbould's* bill was filed, and submitted to Mr. *Marcus Smith* for approval, and in case of difference the amounts to be determined by Mr. *Charles Sacré*.

V. C. B.
1875
FIRTH
v.
MIDLAND
RAILWAY CO.

"The company to pay the amount, when agreed or determined, to Mr. *Firth* in discharge of all obligations as to the road.

"A release to be executed to the company if required.

"The purchase to be completed forthwith, and the company's obligations as to the other road to continue in force.

"The company to pay the costs in *Newbould* v. *Midland Railway Company*."

The plan above referred to was the same as the plan referred to in the letter of the 24th of July, 1868, the approach from *A.* to *B.* being an approach in a straight line to the more northerly of the two skew bridges over the railway.

On the 17th of April, 1869, *John Firth* died, having devised his estate to the present Plaintiffs, *Mark Firth*, *Henry Harrison*, and *Frank Wever*, upon certain trusts.

The trustees, after *Firth's* death, purchased the property of the Plaintiffs in *Newbould* v. *Midland Railway Company*, and on the 21st of July, 1870, the bill in that suit was dismissed, the company being ordered to pay the costs.

Further applications to the company by Mr. *Marcus Smith* having been made, the trustees' solicitors, on the 17th of March, 1871, again wrote to the company's solicitors asking for completion of the road with as little delay as possible; and on the 27th of May they repeated the demand in the following terms:—"Our clients require the company to complete the roads across the railway in pursuance of the Parliamentary agreement entered into with Mr. *Firth* by the company, on his agreeing to withdraw his opposition to the company's bill. We are quite aware that part of one of the roads was left in an unfinished state, in consequence of the suit instituted by Messrs. *Newbould & Rodgers*, but the company was to pay the costs of completing it to Mr. *Firth*. This has never been done . . . . Do the company propose that our clients shall complete the roads, and charge the company with the cost?"

On the 12th of June the company's solicitors wrote that they had instructed Mr. *Crossley*, an engineer, to prepare and forward to them "an estimate in accordance with the agreement of February, 1869." On the 1st of November they again wrote: "The engineers are much pressed at this time with Parliamentary

work. We will get the estimate as soon as possible, and in the meantime will prepare draft conveyance."

On the 24th of December, 1871, Mr. *Marcus Smith* died.

On the 17th of May, 1872, the company's solicitors wrote to the trustees' solicitors as follows:—

"Mr. *Crossley* writes us that his estimate for completing the approach is—

| | |
|---|---|
| "Exclusive of earthwork . . . | £700 17 |
| "And say, for earthwork . . . | 150 0 |
| | £850 17" |

On the 22nd of May the draft conveyance was sent by the company's solicitors for perusal.

In answer to the letter of the 17th of May, 1872, the trustees' solicitors, on the 10th of June, 1872, wrote, "The trustees insist that the works are to be executed in conformity with these notices" (*i.e.*, of the 17th of May, 1867, and the 10th of December, 1867). "The trustees are unable to accept Mr. *Crossley's* estimate, or any estimate of the cost of the works. As the works are to be erected, the question is not one of estimated, but of actual cost. We see no necessity for reverting to the terms of the 6th of February 1869. We observe that those terms contemplated an immediate completion of the matter, and were only agreed to by Mr. *Firth* on that distinct understanding." They then demanded payment of the following sums:—Agreed amount of purchase-money and compensation, £2250; interest at 5 per cent., from the 20th of March, 1867, £587 15*s.*; costs and expenses agreed to be paid by the company, say £400; and claimed future interest on the total, namely, £3237 15*s.* 5*d.*, from the date of that letter.

In answer the company's solicitors, on the 1st of July, 1872, said they were prepared to carry out their agreements with Mr. *Firth*, but could not accept the trustees' statements of their obligations, "as you practically ignore the agreement made on the 6th of February, 1869." They said it rested with the trustees to carry out that agreement.

On the 5th of July, 1872, the draft conveyance was returned, perused.

V.-C. B.
1875
FIRTH
v.
MIDLAND
RAILWAY CO.

The bill was filed on the 19th of November, 1872, by the trustees against the company, alleging that the agreement of the 6th of February, 1869, was entered into by Mr. *Firth* on a distinct understanding that the matter would be completed, and the money due to him for principal and interest, and for the cost of the road, would be paid immediately; that no estimate as proposed by that agreement was ever submitted to Mr. *Marcus Smith*, and that, as he died before any such estimate was made, the method contemplated by that agreement of estimating the cost was now impracticable.

The bill prayed, 1, for specific performance of the agreements of the 13th of May, 1864, and of May, 1867; 2, that the Defendants might be ordered "to complete the said bridges, approaches, and works, according to the arrangements constituted by the said agreement of the 13th of May, 1864, the said notices of the 17th of May, 1867, and 10th of December, 1867, and the said agreement of May, 1867;" or, in the alternative, that the Plaintiffs might be at liberty to complete the works, and the Defendants ordered to pay the costs; 3, for payment of the purchase-money of £2250, and interest from the 20th of March, 1867; and, 4, for damages; with other relief.

The Defendants by their answer, filed the 2nd of April, 1873, stated as follows:—

"We admit that we do refuse to complete the road in the said agreement of the 6th of February, 1869, described, in the manner contemplated by the said agreement of the 13th of May, 1864, or to pay to the Plaintiffs the actual cost which they may incur in completing the same; but we are, and always have been, ready and willing to pay to the Plaintiffs the estimated costs of completing the said road in manner aforesaid, to be ascertained and determined as provided by the said memorandum of agreement of the 6th day of February, 1869; and in all other respects duly to perform the said agreements between us and the Plaintiffs."

They further said:—

"We deny it to be true, however, that the method of determining the amounts of the estimate of the costs contemplated by that agreement is now impracticable. Mr. *Charles Sacré*, in the

said agreement named as the person to determine the amount of the said estimate in case of difference, is living, and willing to determine it; and we are, and always have been, willing to abide by his decision."

Mr. *Kay*, Q.C., and Mr. *Marten*, Q.C., for the Plaintiffs:—

After the agreement of the 6th of February, 1869, it was the duty of the Defendants at once to have taken steps to obtain Mr. *Crossley's* estimate, and also to have completed the purchase; but they did nothing. In December, 1871, Mr. *Marcus Smith* died; and not until May, 1872, was the estimate sent. They now say they are willing to pay these estimated costs under the agreement of the 6th of February, 1869, but not the actual costs under the former agreements and notices. That is the substantial point at issue.

Here, then, was a distinct agreement concluded in May, 1867, to make certain roads, of which the full details were settled by Mr. *Smith* in his lifetime. This was afterwards varied by another agreement of the 6th of February, 1869. But the latter agreement was made conditional on its being immediately carried out. We were content to relieve them of part of their obligations under the former contract, if they would pay us immediately a sum to be estimated in a particular way by a particular person. They delay for three years. Meanwhile the particular agent dies; the estimate cannot be made in the way proposed, and the agreement of the 6th of February, 1869, cannot be performed. Under these circumstances, we ask the Court to say that the original agreement, for which we intended to substitute the inchoate agreement of February, 1869, must be performed specifically.

We ask either for a declaration that we are entitled to make the road ourselves, and to charge the company with the expenses: or, for a decree to compel the company specifically to make these accommodation works. The jurisdiction of the Court to do this is established by *Storer* v. *Great Western Railway Company* (1); *Lytton* v. *Great Northern Railway Company* (2); *Greene* v. *West Cheshire Railway Company* (3).

(1) 2 Y. & C. Ch. 48. (2) 2 K. & J. 394. 2 Jur. N.S. 486
(3) Law Rep. 13 Eq. 44.

V.-C. B. 1875 FIRTH v. MIDLAND RAILWAY CO.

But where the contract is to build houses in a way as to which particular persons are to be consulted, and they come to no decision, the Court will not decree specific performance: *Tillett* v. *Charing Cross Bridge Company* (1). In this case the Master of the Rolls spoke of *Gregory* v. *Mighell* (2) as a very strong decision. In *Gregory* v. *Mighell* there was a price to be paid which was to be fair and reasonable, and as arbitrators to be named should fix. No arbitrators were ever named; nevertheless Lord *Eldon* granted specific performance, no doubt, as the Master of the Rolls observed, in consequence of the presence of the words "fair and reasonable." So in *Darbey* v. *Whitaker* (3) the Court reluctantly refused to grant specific performance of an agreement, one part of which, namely, the price to be paid, was left to be determined by arbitration, and never was fixed; and in *Vickers* v. *Vickers* (4) it was held that there was no contract which the Court could specifically enforce.

Here the Defendants have had possession; that is, there has been part performance. Under these circumstances the Court will not allow a party to escape from his engagements on the ground of the *Statute of Frauds*, after the other party has expended his money; and will, if the Plaintiff, at the hearing, should fail to establish the precise terms of the agreement, endeavour to collect what they really were: *Mundy* v. *Jolliffe* (5); it being the duty of the Court, as far as possible, to ascertain the terms of the agreement, and give effect to them: *Wilson* v. *West Hartlepool Railway Company* (6).

There is the further point, that time was of the essence of the inchoate contract of February, 1869, which was intended to be substituted for the former. The words are, "the purchase to be completed forthwith." Even if there should be a difference as to this upon the true construction, we say we understood the agreement of February, 1869, in this way; and the onus is on the Defendants, if they insist upon a substituted contract, to shew that the terms of it were understood in the same sense by both of us: *Earl of Darnley* v. *London, Chatham, and Dover Railway*

(1) 26 Beav. 419. 5 Jur. N.S. 994
(2) 18 Ves. 328.
(3) 4 Drew. 134.
(4) Law Rep. 4 Eq. 529.
(5) 5 My. & Cr. 167, 177.
(6) 2 D. J. & S. 475. 11 Jur. N.S.

*Company* (1); *Wycombe Railway Company* v. *Donnington Hospital* (2).

The result of the whole is that the agreement of February, 1869, is not binding on us, and is inoperative.

Mr. *Fry*, Q.C., Mr. *Jackson*, Q.C., and Mr. *Speed*, for the Defendants:—

The question is, can the Plaintiffs insist upon the specific performance of two agreements, without including the third? When the Plaintiffs bring forward lapse of time as being fatal to the agreement of February, 1869, they overlook the fact that laches and acquiescence would have equally put an end to the former agreements. But in fact there were two separate terms in the contract—one relating to the accommodation works, the other to the purchase. The word "forthwith" was meant to apply to the payment of purchase and compensation money, not to the accommodation works. Can it be said that this was a condition, on the non-fulfilment of which the whole contract must be abandoned and fail?

Then as to the construction of the contract: the true meaning is that in case of any difference, no matter what, Mr. *Sacré* was to be the umpire. All that was mentioned was Mr. *Marcus Smith's* "approval." He was not appointed an arbitrator.

As to the cases cited: *Tillett* v. *Charing Cross Bridge Company* (3) did not involve any question of price; in *Darbey* v. *Whitaker* (4) it was essential that the price should be fixed by arbitration; so in *Vickers* v. *Vickers* (5).

The rule is laid down in *Milnes* v. *Gery* (6), where Sir *W. Grant* says there may be specific performance in all cases except where the price has to be fixed by arbitration, and the arbitration fails. Of this *Gourlay* v. *Duke of Somerset* (7) is an example. These cases were followed in *Jackson* v. *Jackson* (8). But where the fixing of a value by arbitrators is not of the essence of the contract, the Court will carry the agreement into effect, and, if necessary,

(1) Law Rep. 2 H. L. 43, 60.
(2) Ibid. 1 Ch. 268.
(3) 26 Beav. 419.
(4) 4 Drew. 134.
(5) Law Rep. 4 Eq. 529.
(6) 14 Ves. 400.
(7) 19 Ibid. 429.
(8) 1 Sm. & Giff. 184.

V.-C. B. 1875 FIRTH v. MIDLAND RAILWAY CO.

ascertain the value: *Dinham* v. *Bradford* (1); *Richardson* v. *Smith* (2).

They are, in fact, attempting to repudiate part of an agreement. The late Mr. *Firth* shewed a willingness to treat non-performance as a subject of pecuniary consideration. Having done that, supposing the other parts of the contract can be treated in the same way, he could not, and the Plaintiffs, his devisees, cannot have specific performance: *Paris Chocolate Company* v. *Crystal Palace Company* (3). Either the Plaintiffs must take a decree for specific performance of all the contracts, or the bill must be dismissed.

The VICE-CHANCELLOR:—All I wish to hear you on, Mr. *Kay*, is as to the second alternative of the second paragraph of the prayer.

Mr. *Kay*, in reply:—

We cannot force the Defendants to pay what it may cost us to complete these works. The only agreement we are entitled of right to enforce against them is that they shall construct the works. But if our right be once established, the question will reduce itself to this—Shall the company make the works themselves, or pay the actual expense of making them?

The only claim which they make is to be allowed to make an estimate, and be ordered to pay no more than the amount of that estimate. We say the estimate cannot now be made in the stipulated manner; and that unless and until the estimate is made, there is no contract of February, 1869: *Vickers* v. *Vickers* (4). Mr. *Sacré* was not to have been called in unless it had been found impossible for Mr. *Marcus Smith* and the other valuer to agree.

SIR JAMES BACON, V.C.:—

The only point which it is necessary for me seriously to consider is that which arises upon the agreement of February, 1869, or rather upon that part of it which alone remains, namely, the stipulation for the completion of these roads.

Now that this part of the agreement cannot be performed in

(1) Law Rep. 5 Ch. 519.
(2) Ibid. 648.
(3) 3 Sm. & Giff. 119.
(4) Law Rep. 4 Eq. 529.

the manner and form therein specified, is of course beyond the possibility of dispute. Prior to the 6th of February, 1869, the agreements of 1864 and 1867 being in existence, and neither side seeking to depart from them, it was plainly incumbent upon the railway company to make the roads. Then there seems to have been a suggestion made—it does not appear very distinctly why, and it is not necessary to inquire—(perhaps owing to the suit of *Newbould* and *Rodgers* against the company) that it would be more convenient for Mr. *Firth* to keep the making of the roads in his own hands than for the railway company to do that which, under the original agreement, they were plainly bound to do, namely, to make the roads; and accordingly, on the 6th of February, 1869, it was stipulated that an estimate should be made "by Mr. *Crossley* for making the road from *B.* towards *C.* according to the arrangements existing before Messrs. *Newbould* and *Rodgers'* bill was filed;" and that was to be "submitted to Mr. *Marcus Smith* for approval, and in case of difference, the amounts" were "to be determined by Mr. *Charles Sacré*."

Now the meaning of that is exceedingly plain, and is not to be disputed. The company have their partisan—I use the word in no invidious sense—namely, Mr. *Crossley;* and Mr. *Firth* has his partisan, viz., Mr. *Marcus Smith,* who from the very beginning of these transactions, it is clearly evident, was acquainted with the whole subject of the plans and roads, and knew perfectly well the requirements which his client—if I may so call him—Mr. *Firth,* would desire. Accordingly Mr. *Firth* stipulates that he shall have the help of *Marcus Smith.* Although he, Mr. *Firth,* will receive the estimate that Mr. *Crossley* may send, he will not adopt it unless Mr. *Marcus Smith* approves of it. Then, in case there should be a difference, but only in that case, between the estimate submitted by *Crossley,* and the comments made upon it by *Marcus Smith, Sacré* was to determine upon those points in difference between them, and fix the amount to be paid.

Well, from the date of that agreement in February, 1869, the company were required to furnish, and had abundant opportunity of furnishing, that estimate by *Crossley;* but they did not do so until May, 1872, more than two years after the matter ought to have been settled. The reason for this, and the only reason I can

V.-C. B. 1875 FIRTH v. MIDLAND RAILWAY CO.

find, is that suggested in the letter of November, 1871, in which they say, "The engineers are much pressed at this time, and we will get the estimate made as soon as possible."

How, then, can that agreement be now performed? Admittedly it cannot be performed now in spirit and in meaning. It is in vain to say that the Court has it in its power of itself to enforce such an agreement as this, or any agreement for a valuation; unless the valuation be a matter wholly subsidiary to, and not of the essence of, the agreement. The Court has no other power than to deal with the case which the bill presents to it. It is by no fault of Mr. *Firth* or of the Plaintiffs that the agreement has not been performed. Neither he nor the Plaintiffs have ever sought to evade the performance of it. The Plaintiffs do not now, as I understand from the record, seek to withdraw from the performance of the agreement, if it can be performed, as the late Mr. *Firth* and the Defendants intended it should be performed. It is wholly impossible for *Sacré*, even if the estimate were proceeded with to-morrow, to enter into it, inasmuch as he would not have the advantage of hearing what *Marcus Smith* might have had to say as to the reason why the road should be carried in some particular direction, or as to the materials of which it should be made—in short, he would not have the opportunity of doing that which, and only which, the agreement says he was to be called upon to do, viz., to decide between the two parties "in case of difference" between them as to the amounts to be paid.

To go into any other part of the case seems to me to be unnecessary. That the roads are to be made is not disputed. The duty of making them is, in the first instance, thrown upon the company, and the company are offered by this bill the alternative of permitting the Plaintiffs to do the works, or of undertaking to pay the Plaintiffs after they have done them. The Defendants are under no obligation to accept that alternative; but I think, in all fairness and honesty they are obliged to make the roads. They have promised to make them, they have never been relieved from that promise, and it never was intended they should be relieved. Nobody can read the agreement of February, 1869, and suppose that it was intended thereby to confer any benefit upon the company, though it may have established a state of circumstances

more convenient to them. Nor was the agreement ever intended to diminish the rights of Mr. *Firth*.

What the Plaintiffs insist upon now, and I think with perfect reason, is, that the original agreements of 1864 and 1867 ought to be carried into execution. That is what they ask by the bill, and to that decree I think they are entitled, unless some arrangement between the parties can be suggested which the Court can adopt, and which will render it unnecessary for me to make the decree in those terms. Otherwise I shall decree that the company be ordered to complete the roads, bridges, and approaches according to the arrangements stated by the agreement of the 13th of May, 1864, the notices of the 16th of May, 1867, and the 10th of December, 1867, and the agreement of May, 1867.

Mr. *Kay*:—The decree will be according to the first alternative of the second paragraph of the prayer of the bill. I ask for damages, and for the costs of the suit.

Mr. *Fry* submitted there was no case for damages.

SIR JAMES BACON, V.C.:—

I do not think there is any case specially alleged or proved, such as would justify my allowing any inquiry as to damages. The parties have been in communication all this time, and I think it would be going beyond the justice of the case to direct any inquiry as to damages. But since I find that the Plaintiffs and Mr. *Firth* have been asking for their money from the time it was due to Mr. *Firth*, that is, from the time that possession was taken, and asking for it in vain, I think the Defendants have no excuse for not making payment of the interest. The question as to the completion of the bridges and approaches may furnish some sort of excuse for the other payment not being made, but the payment of the interest is a matter of right, which ought never to have been withstood by the company. Instead of making compliance with that fair demand, they tried to evade it with a kind of feeling throughout this correspondence which I do not look at with any satisfaction. The result, I find, has been, from the year 1867 to the year 1875, to keep this landowner and his

V.-C. B. 1875 FIRTH v. MIDLAND RAILWAY CO.

devisees out of the price which the company ought to have paid for the land.

The Plaintiffs are, therefore, in my opinion, entitled to interest on the purchase-money at 5 per cent. from the 20th of March, 1867, up to the present time. The costs and expenses form an item upon which I do not think the Plaintiffs can have interest. The costs and expenses are those provided for by the original agreement. The Defendants must pay the costs of this suit.

Solicitor for the Plaintiffs: Mr. *Henry A. Maude*, agent for Messrs. *Broomhead, Wightman, & Moore, Sheffield.*

Solicitors for the Defendant: Messrs. *Beale, Marigold, & Beale.*

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V.-C. B. 1875 *March* 18, 19.

## *In re* COAL ECONOMISING GAS COMPANY.

### GOVER'S CASE.

*Companies Act*, 1867, s. 38—*Antecedent Contract—Promoter—Misrepresentation in Prospectus.*

In July, 1873, *A.* agreed to purchase a patent from *B.* for £65,000, payable partly in cash and partly by an allotment of shares in a company to be formed for working the patent, with a stipulation that *A.* should with as little delay as possible use his best endeavours for the formation of such a company. In October, 1873, *A.* agreed with *C.*, as a trustee for the intended company, for the sale to him of the patent for £125,000, payable in cash and shares, with a proviso that *A.* should be appointed managing director. The company, of which *A.* became a director, was formed in November, 1873, and a prospectus was issued containing no mention of *A.'s* contract with *B.*

Upon motion by a person who had applied for shares after seeing the prospectus, for removal of his name from the register, on the ground that the omission from the prospectus of the contract by which *A.* as a promoter purchased *B.'s* patent for the purposes of the company was fraudulent under the *Companies Act*, 1867, *s.* 38:—

*Held*, that as *A.* had not been shewn at the date of his contract with *B.* to have been a promoter of, or in a fiduciary position towards the company afterwards formed, the omission from the prospectus of all notice of that contract was not fraudulent within the meaning of the *Companies Act*, 1867, s. 38.

*Semble*, that if *A.* had been an actual promoter of the company at the time of the contract, so as to bring the case within sect. 38, the remedy given by that section for fraudulent omission was against the delinquent promoter,

&c., personally, and not against the company by removing the name of the shareholder, who had taken his shares on the faith of the prospectus, from the register:—

*Held*, also, independently of the *Companies Act*, 1867, that neither the omission from the prospectus of the agreement with *B.*, nor the increased price charged by *A.* on his sale to the company of *B.'s* patent afforded any ground, under the *Companies Act*, 1862, s. 35, for releasing shareholders who took their shares in ignorance of these circumstances.

THIS was a motion under the *Companies Acts*, 1862, 1867, on behalf of Miss *Gover*, the holder of ten shares in the *Coal Economising Gas Company, Limited*, that the register of members of the company might be rectified by striking out her name therefrom, on the ground that the prospectus, on the faith of which she applied for, and received an allotment of, shares in the company, did not disclose a material contract entered into by an alleged promoter of the company before the issue of the prospectus.

It appeared that on the 23rd of July, 1873, an agreement was entered into by *Henry Skoines* for the sale to *W. S. Mappin* of his patent for improvements in the manufacture of gas, dated the 8th of March, 1873, at the price of £65,000, to be paid as follows:—£1000 upon the signing of the agreement; £4000 in cash within twenty-one days after an allotment of shares in a company, to be formed and registered with limited liability by *Mappin* for the purpose of working the patent, should have been made; £15,000 in fully paid-up preference shares of the company, bearing interest at 15 per cent. per annum; and £45,000, the balance of the purchase-money, in fully paid-up ordinary shares of the company. It was also agreed that *Mappin* should, with as little delay as possible, use his best endeavours to form, or cause to be formed and registered, pursuant to the *Companies Acts*, 1862 and 1867, a company with limited liability, with a capital not exceeding £150,000, having for its objects the acquiring and working of the said letters patent thereby agreed to be sold; and that on the formation of such company *Skoines* should be entitled to nominate two persons to act as directors, but such nomination to be subject to the approval of *Mappin*. In case *Mappin* failed to form a company the agreement was to become void, and the deposit of £1000 was to be forfeited to *Skoines*. *Mappin* was to be at liberty, before entering upon the formation of the company, to test the invention of *Skoines*

V.-C. B. 1875 GOVER'S CASE.

by experiments, *Skoines* giving all such assistance as might be needed in carrying out such experiments.

On the 23rd of October, 1873, an agreement was entered into between *Mappin* and *J. H. Wright*, therein described as a trustee for and on behalf of the company intended to be forthwith formed and registered with limited liability under the name of the *Coal Economising Gas Company*. By this agreement *Mappin* agreed to sell to *Wright* as such trustee the patent of the 8th of March, 1873, together with the full benefit and advantage thereof. The purchase-money was £125,000, payable as to £75,000 in cash within twenty-one days after the resolution of the directors for the allotment of shares in the intended company and the adoption by them of this agreement; £7500 in cash within two months from the date of the first payment; the further sum of £45,000 in fully paid-up shares entitled to a preferential dividend of 10 per cent. over the shares next mentioned, and the balance of £65,000 in deferred shares in the company, also fully paid up. It was also provided by this agreement that the said intended company should appoint, or cause to be appointed, *Mappin*, as the first managing director thereof.

The company was registered on the 4th of November, 1873.

On the 12th of January, 1874, Miss *Gover* saw the prospectus of the company, and was induced by the statements therein contained to apply for ten shares in the company, which were allotted to her.

The only agreement mentioned in the prospectus was that of the 23rd of October, 1873.

The company had not been successful, and Miss *Gover*, who was being pressed for payment of the amount remaining unpaid on her shares, now moved to have her name removed from the list of shareholders, on the ground that the prospectus did not disclose the contract of July, 1873, which, when the prospectus was issued, had been made by a promoter of the company before the issue of the prospectus: such contract being a material one, the existence of which ought to have been stated on the face of the prospectus. She stated in her affidavit her belief, from inquiries which had been made on her behalf and from the information which she had received, that *Mappin* was on the 23rd of July, 1873, a promoter of the company.

In answer to this affidavit, *Mappin*, by his affidavit, denied that at the date of the agreement of the 23rd of July, 1873, he was in any way a promoter of the company. He stated that before any step could be taken by him for the purpose of forming the company it was necessary that he should acquire at least the equitable ownership of the patent which the company intended to work; and the agreement of July, 1873, was entered into by him in his private capacity for the purpose of such acquisition, and with a view to such ownership. In point of fact, the promotion of the company was not set on foot or initiated by him until more than two months after the date of such agreement, and having regard to the season of the year when the agreement was signed, it would have been futile to have attempted to form any company to purchase his equitable interest at that time. As the company were in no way parties to or affected by the agreement, he did not consider it necessary to submit it to the directors, or to communicate it to the board in any way.

*Mappin* had not been cross-examined upon his affidavit.

Mr. *Jackson*, Q.C., and Mr. *Ince*, in support of the motion:—

Miss *Gover* is entitled to have her name removed from the register, because the prospectus, on the faith of which she took her shares, is fraudulent within the meaning of the *Companies Act*, 1867, s. 38, inasmuch as it contains no notice of the contract of July, 1873, entered into by *Mappin*, who was then a promoter and afterwards a director of the company, in view of the formation of the company.

The *Companies Act*, 1867, s. 38, gives the shareholders the legal right (though such right is exercised in this Court) to say that the prospectus is fraudulent as against them if it knowingly omits to notice a contract "entered into, &c., before the issue of such prospectus": *Charlton* v. *Hay* (1). That right being established, we call in aid the *Companies Act*, 1862, s. 35, and say that the applicant is entitled to be released from her agreement, entered into on the faith of a prospectus which is fraudulent under the Act of 1867, from the suppression of the fact that the patent forming the subject-matter of the company's operations, was purchased by a pro-

(1) 31 L. T. (N.S.) 437. 23 W.R. 129

V.-C. B. 1875 GOVER'S CASE.

moter and director of the company for half the price at which he afterwards sold it to the company.

*Askew's Case* (1) (which appears from the report in the Court below (2) to have been an application under the Act of 1867 as well as that of 1862) establishes the right of the shareholder, upon a similar suppression of material facts, to this relief; although in that case, as the applicant was the holder of fully paid-up shares, the Appeal Court declined, by making the order, to prejudice the question of recovering from the company the money paid upon his shares. The case is brought within sect. 38 of the Act of 1867, as at the time of entering into the contract of July, 1873, *Mappin* was clearly a promoter of this company, inasmuch as he was engaged in getting up the company, and bound himself by his agreement with *Skoines* to promote, and actually did promote, this company, which was formed for the purpose of working *Skoines'* patent. Although he states that the formation of the company was not set on foot for more than two months after the agreement, he himself accounts for this delay by the incidence of the Long Vacation; and under sect. 38 there is no limitation, but a contract entered into at any time in view of the formation of the company must be stated in the prospectus. The omitted agreement with *Skoines*, under which *Mappin*, then engaged in getting up the company, purchased for £65,000 that for which the company were charged £125,000, thus obtaining a private benefit at the expense of the company, was essentially one which the shareholders were entitled to see before making their bargain, required the fullest disclosure; and as against them its concealment was fraudulent. The principle that promoters and directors will not be allowed to acquire gain at the expense of the company, is equally applicable where all the persons interested in the company commit that which is a fraud on those only who subsequently join it: *Lindl.* Partnership (3); *Society for Illustration of Practical Knowledge* v. *Abbott* (4); *Hichens* v. *Congreve* (5); *Beck* v. *Kantorowicz* (6). In this case the misrepresentation by *Mappin*, who clearly stood in the position of a promoter, was so gross as to be equivalent to fraud;

(1) Law Rep. 9 Ch. 664.
(2) 22 W. R. 762.
(3) Pages 597, 605.
(4) 2 Beav. 559.
(5) 1 Russ. & My. 150.
(6) 3 K. & J. 230.

and as against any one coming, as Miss *Gover* does, to be relieved without delay, the company cannot insist upon the contract as binding.

Mr. *Kay*, Q.C., and Mr. *Cookson*, for the company:—

The *Companies Act*, 1867, s. 38, creates a new fraud by making the omission from the prospectus of a contract "entered into by the company, or the promoters, directors, or trustees thereof, before the issue of such prospectus," that which it was not before—"fraudulent on the part of the promoters," &c.

But there is nothing in the section saying that such omission shall entitle the shareholder to an actual rescission of his contract to take shares. It merely gives him the right to bring an action of deceit against the promoter or director who has been guilty of the omission; and although it has been doubted whether the section creates any statutory cause of action, *Cornell* v. *Hay* (1), the language used, especially the introduction of the *scienter* (knowingly issuing), points to a remedy by action and not to a release from the contract.

Both before as well as after the Act of 1867, *suppressio veri* just as much as *suggestio falsi* might enable the shareholder who had been deceived to be released from his contract under the *Companies Act*, 1862, s. 35. But in proceedings at law for an alleged deceit the mere concealment of a material fact gives no right of action to the person who, if the real facts had been known, would never have entered into the contract: *Peek* v. *Gurney* (2).

But whatever relief may be given by the *Companies Act*, 1867, s. 38, the applicant has not brought her case within the provisions of that section, as the contract of July, 1873, was not a contract by a promoter or officer of the company such as is required by sect. 38 of the Act to be stated in the prospectus. The argument on the part of the applicant amounts to this, that whenever a man sells to a company for the purposes of its operations any property or commodity, the title-deed by which he acquired that property or commodity, at no matter what distance of time, must be set out in the prospectus. It is not disputed that no one standing in a fiduciary position with regard to a company can make any profit

(1) Law Rep. 8 C. P. 328. (2) Law Rep. 6 H. L. 377, 390.

V.-C. B. 1875 GOVER'S CASE.

as against his company; and accordingly any contract or bargain made by him while in that position must be disclosed to the shareholders. But that rule does not apply to this case, as there is the uncontradicted evidence of *Mappin* that he was not a promoter of the company when he entered into the agreement of July, 1873, and that no steps were taken for the formation of the company until more than two months afterwards. There is nothing fraudulent as against the company in that agreement, by which *Mappin* acquired from *Skoines* the patent which he afterwards sold to the company at an advanced price so as to bring the case within the cases cited, in all of which a direct fraud had been practised upon the company. Upon these grounds then—(1) that *Mappin* was not a promoter of the company when he entered into the agreement with *Skoines* so as to render the omission of that agreement from the prospectus fraudulent under the *Companies Act*, 1867, s. 38; and (2) that it was not intended by that section to make such an omission a ground for rescinding the contract to take shares, but a fraud for which the remedy of the shareholder was by action at law—we submit that Miss *Gover* is not entitled to have her name removed from the register of shareholders.

Mr. *Jackson*, in reply:—

At the time he entered into the contract of July, 1873, *Mappin* was clearly a promoter of the company, engaged in taking those steps which enabled it to be formed into a legal entity. He acquired under that contract the equitable interest in the patent, not for his own benefit, but for the express purpose of transferring it to the company; and by no possibility, having regard to the terms of the agreement, could *Skoines* have been compelled to transfer the patent to *Mappin* otherwise than as a conduit-pipe for the company in which *Skoines* was to be a partner, and for the formation of which he had stipulated. *Mappin*, therefore, purchased the patent and transferred it to the company in a purely fiduciary capacity.

[The VICE-CHANCELLOR:—As between *Mappin* and the company, I do not understand that there was any suppression of the fact of his contract with *Skoines*.]

V.-C. B. 1875 GOVER'S CASE.

It is not necessary to establish suppression in that respect. It is enough to shew that this was a contract relating to the subject-matter of the company, and entered into by a person on behalf of the company which he was then engaged in forming. As such, it was a contract within the provisions for the protection of shareholders contained in sect. 38 of the Act of 1867. The language of that section does not bear out the contention on the other side, that the suppression of such a contract entitles the shareholder who has been deceived to a remedy by action only; the words being "shall be deemed fraudulent on the part of the promoters," &c., not "fraudulent as against."

The general right of a shareholder, irrespective of any interest acquired by creditors against the company, to be relieved from a contract which he has been induced to enter into by misrepresentation (either by the statement of what is false or the suppression of something that ought to have been disclosed) is established by *Smith's Case* (1); and that the fraud of a director or promoter is the fraud of the company, who will be bound by the misrepresentations of its agents, is shewn by *New Brunswick and Canada Railway and Land Company* v. *Conybeare* (2).

SIR JAMES BACON, V.C.:—

This case has been very fully and very ably argued. It cannot be said to be without difficulty, and the difficulty arises, in my mind, chiefly from the expressions contained in sect. 38 of the *Companies Act*, 1867. That section for the first time introduces the proposition that if there be any contract entered into by a promoter or director, or any other persons officers of the company, it must be disclosed in the prospectus. Until that Act of Parliament passed there was no such law in existence. The earlier Act of 1862 did give to shareholders who had been defrauded the right of rescinding the contract and to be released from the obligations they had entered into. This, I believe, is the first case in which the question has arisen upon this particular section, and it is insisted on the part of the shareholder that inasmuch as *Mappin* entered into an agreement for the purchase of a patent from *Skoines*, and *Mappin* afterwards sold his interest acquired under

(1) Law Rep. 2 Ch. 604, 616. (2) 9 H. L. C. 711. J. M. 1875

V.-C. B. 1875 GOVER'S CASE.

that agreement to the company, that fact ought to have been stated in the prospectus in the manner prescribed by the statute, and the date, &c., ought to have appeared. But then it is denied by *Mappin* that he ever was a promoter of this company. At the time when he entered into the agreement, of course he could not be called a promoter of the company, for the company had no existence, and he has stated positively that he was no promoter of this company. Evidence on that subject might have been adduced. It is a simple matter of fact; he was or was not a promoter. He might have been cross-examined on his affidavit, but that course is not pursued, and the shareholder's counsel undertakes to prove that he must be considered to have been a promoter, first, because in the agreement with *Skoines*, *Mappin* engages to form a company, and next, because he is the vendor to the existing company. In my opinion that is inconclusive reasoning. It does not establish any such fact, for this might have happened: A man in *Mappin's* position, or *Mappin* himself, might have advertised the fact that he had acquired a valuable patent by purchase from *Skoines*, and was willing to sell it to any company that chose to buy it of him; and then if any persons took it into their heads to promote a company, they would be promoters, but he would be no promoter. I have not heard a single fact or any suggestion that he was a promoter of the company, excepting only the argument derived from the original agreement; and, in my opinion, against the positive assertion that he was no promoter of the company, that reasoning cannot take the place of proof, and cannot establish the fact that he ever was a promoter of this company. An interval of two months elapsed, which is explained in his affidavit, and it has been observed with perfect truth, that the period of the year was not favourable to the formation of companies, but there is no trace that at any time *Mappin* promoted the formation of this company. He had acquired a commodity by contract between himself and *Skoines*. It was his to sell or deal with in any way he thought fit. He was bound, if *Skoines* insisted on it, to fulfil all the terms of the agreement. Whether he did or did not was an affair between himself and *Skoines* with which the company had nothing to do. Well, then, was it incumbent on *Mappin*, when he dealt with the company for the sale to them of the patent which he had con-

tracted for with *Skoines*, to tell them the price at which he had agreed to buy it? I can conceive no reason why he was under such obligation. If he had advertised it in the way I have suggested as being possible—not that it has any relation in fact to the circumstances of this case—but if he had advertised that he was ready to sell a patent of which he had become the owner, the purchaser, or persons proposing to become purchasers, would have no right to ask him what he had given for it, and he would be under no obligation to disclose what he given for it. If the prospectus had contained a statement of the fact it could have made no difference, because the subsequent contract of purchase by the company from *Mappin* could not have been influenced in any degree by the fact that he had bought at one-half the price for which they had bought it from him. It cannot in reason be suggested that, if stated, it would have made any difference in the opinions of the shareholders, or that the shareholders or intending shareholders could have been in any degree prejudiced, affected, or even influenced by the fact that he had bought at a very cheap rate that which he was selling at a comparatively dear rate. The fact that he was a promoter, which is necessary to establish this case, is not, therefore, in my opinion, established by the evidence before me, and I cannot adopt the inferences drawn from the stipulations in the agreement as evidence of that which is unsupported by any other kind of evidence. Upon that ground, therefore, in my opinion, the applicant is not entitled to the relief which she seeks. She would be entitled under the Act of 1862, if she had shewn any equitable ground upon which she was entitled to be discharged from the contract. Leaving out of consideration for the moment the new law which is introduced by the Act of 1867, I cannot find any equitable ground upon which she would be entitled to relief. It is not inequitable that a man should buy as cheap and sell as dear as he can. The seller is under no obligation to state the price at which he purchased. The purchasers are the best judges of whether the thing offered for sale is worth the money which is demanded for it, and the shareholders know when they apply for shares, having read the prospectus, that the price which the company are to pay is that which is expressed in the agreement referred to in the prospectus. I say, therefore, laying aside the

V.-C. B. 1875 GOVER'S CASE.

Act of 1867, no equitable ground has been suggested upon which a shareholder would be entitled to retire from the contract entered into.

I am unable to follow the reasoning by which it is said that there is a fiduciary relation between the parties.

In the cases referred to, the fiduciary relation was clearly and plainly established, and the Court proceeded upon it; but what trust or confidence exists in the case of a man who buys a patent for £60,000 and offers to sell it for £120,000?

The cases referred to were clear cases of trust which had been betrayed, of fiduciary relation which had not been respected, and there is no ground for applying that principle to this case.

On the first point which has been argued, the evidence that Mr. *Mappin* was a promoter of this company wholly fails. It might have been supplied if it was true in fact. Mr. *Mappin* might have had an opportunity of saying or shewing that some other person or persons was or were the true promoter or promoters of this company, that he was vendor and vendor only, that he never did anything to promote the company, but some other persons did. In the case I have been supposing that he had announced to the world that he was the owner of the patent, and was willing to sell it to any company who wanted to buy it, the persons who bought it must, some one or more of them, have taken on themselves the character of promoters, and he would have still remained only a passive agent, not a promoter, but a seller to the persons who did promote the formation of the company. The provisions in the agreement with *Skoines* do point unequivocally and distinctly to the formation of a company, and as between Mr. *Skoines* and Mr. *Mappin* the agreement makes it incumbent on Mr. *Mappin* to do his best to form a company, but that obligation might have been discharged without his doing anything to promote the formation of the company. He might have formed a company by plausible advertisements pointing out how well it was worth a company's while to buy from him the patent which he had to sell, without taking a single step towards promoting the company itself.

I am asked to adopt the words of the statute which speak only, as far as Mr. *Mappin* is concerned, of a promoter, and it is said

that because it was not disclosed in the prospectus that being a promoter—which he is not proved to have been, but whatever he was—the company had bought the patent from him, at twice the money for which he had bought it, the transaction is therefore fraudulent on the part of the company. I agree that a fraud to be committed by a company must be committed by its officers; but the Act of 1867, where the provision is for the first time introduced (and it is guarded carefully), gives, I think, to the shareholders a remedy in this way: that in case the remedy under the Act of 1862 should fail them, if they should be unable to shew that there were any equitable grounds upon which they could be released from their contracts, they may, nevertheless, in the circumstances there mentioned, have an action or a right of recourse against the promoters and other officers of the company, because the statute says it shall be fraudulent on their part. Adopting the reasoning of Mr. *Jackson* as to *New Brunswick and Canada Railway Company* v. *Conybeare* (1), I quite agree that what the officers of the company do the company do. But nobody could say, looking at the Act of 1862 alone, that the suppression, if that is the right word for it—or omission—which seems to be more accurate—of any mention of the original agreement, could have formed any ground on which the shareholder could be released from the contract.

Unless, therefore, in this not very well penned sect. 38, I can find a plain, distinct enforcement upon the company of that which it is said shall be fastened upon the persons who have committed the wrong, I cannot listen to the argument upon that subject. There is, in my opinion, no fiduciary relation, and no fact from which fiduciary relation can be inferred, between a company formed in October and a man who made a purchase in June or July previously—at all events an interval of two months.

I cannot find when any fiduciary relation between them ever existed. I cannot find that before the time when the company came into existence, there was at any period any fiduciary relation between any of the members of the company and *Mappin*. With the company of course there could not be, because it was not in existence. Finding, therefore, a total defect of any fiduciary re-

(1) 9 H. L. C. 711.

V.-C. B. 1875 GOVER'S CASE.

lation between *Mappin* and the company as regards this contract—finding a total defect of evidence that *Mappin* was a promoter of this company, I cannot think that this shareholder, who has come speedily I admit, can retire from the contract which she has entered into, and escape the obligation of contributing to pay the debts which the company has contracted. As was pointed out in *Smith's Case* (1), it is one of the incidents of a contract that creditors, from want of proper caution exercised on their part, may lose their rights. If under the *Companies Act*, 1862, s. 35, the Court decides that the shareholders shall be released because of the fraud, so much the worse for the creditors. The creditor then loses his remedy. But if that is carried too far, it might lead to very great mischief, because a company may go on for ten years or more; debts may be contracted to an enormous amount; and if what the shareholder contends for here is well founded, then all the shareholders who had taken shares in the company where such an agreement as that between *Mappin* and *Skoines* was not disclosed in the prospectus, may walk away without satisfying any of the debts that may have been contracted; and that would be too violent a proposition to be entertained for a moment. But upon the two grounds which have been argued before me,—that there is no fiduciary relation, and that there is no evidence of the fact (although if it be a fact it might have been easily proved) that *Mappin* was ever a promoter of this company; and further, upon the ground that even if he was a promoter, the penal remedy—penal upon him or upon his part—provided by sect. 38 is enforceable, if it exists, against him and him only, and that it does not affect the contract entered into between the company and the shareholders, the prospectus having disclosed the only agreement by which the company was bound, or which could in any degree affect the company, or from which the company could derive any advantage,—the claim to be discharged fails, in my opinion, and the application must be refused.

Solicitors: Mr. *George Davis;* Messrs. *Wilkins & Blyth.*

(1) Law Rep. 2 Ch. 604.

## NUNEATON LOCAL BOARD *v.* GENERAL SEWAGE COMPANY.

V.-C. B.
1875
*March* 24.

[1875 N. 12.]

*Contract between Local Board of Health and a Sewage Company—Alleged Breach of Covenant—Public Nuisance—Bill for Injunction—Demurrer—Control of Engineering Works by the Court—No allegation of Private Injury—Absence of Attorney-General—Demurrer overruled.*

15 L.D. 115

A local board of health entered into an agreement with a sewage company, in pursuance of which they afterwards granted a lease to the company of the sewage works of a town, and of a plot of land, for a term of fourteen years, the company covenanting that they would during the term keep the outfall of the works, with the engines, pumps, and apparatus, in proper working order, so as to admit of the free flow of the sewage through the sewers communicating with the works, and so that the same might not at any time be stopped.

To a bill by the local board against the company, complaining that the company's works were insufficient to treat the sewage successfully, that they were pumping only a portion of the sewage out of the sewers, and were damming up or heading back the residue in the sewers, so as to be a nuisance to the inhabitants of the town, and that the Plaintiffs were being threatened with proceedings, and praying for an injunction to restrain the Defendants from permitting the sewage to remain in the sewers, so as to be a nuisance or damage to the Plaintiffs, and from damming up or heading back the sewage in the sewers, the Defendants demurred, on the grounds that the Court could not superintend the proper performance of the works; that the Plaintiffs had alleged no special damage; and that it was not the practice of the Court to restrain the infringement of a public right at the suit of a corporation, except at the instance or in the presence of the Attorney-General.

Demurrer overruled; and injunction granted.

### DEMURRER.

The bill was filed by the *Nuneaton* Local Board of Health against the *General Sewage and Manure Company, Limited*, and *Henry Lake*.

The bill stated to the effect that in the year 1872 the Plaintiffs had constructed and nearly completed certain sewage works upon a piece of land of about an acre in extent adjoining the river *Anker*, near *Nuneaton*, with steam machinery for pumping the sewage and extracting the manure therefrom, and for purifying

V.-C. B. 1875

NUNEATON LOCAL BOARD v. GENERAL SEWAGE CO.

the effluent water and returning the same to the river. They had also constructed sewers and drains for the town, with an outfall sewer leading to the above works.

In 1872 it was discovered that the above works were not extensive enough, and an agreement for the purpose of enlarging the same was entered into between the Plaintiffs and the Defendants, the *General Sewage and Manure Company, Limited*, who were owners of a patent called *Anderson's* patent for "Improvements in treating Sewage and in the manufacture of Manure therefrom."

By this agreement, dated the 1st of August, 1872, the Plaintiffs agreed to grant, and the Defendants to accept, a lease of the Plaintiffs' works for fourteen years from Midsummer, 1872, at the yearly rent of £10. The company agreed within three months to purchase such land in the vicinity of the works, not being less than two acres, as might be necessary for the purpose of intermittent filtration in connection with the works, and procure a conveyance to be executed to the board. The lease was to contain a power for determination by either party at the end of five years on six months' notice. The company agreed at all times during their tenure to keep the outfall works, engines, pumps, and apparatus in proper working order and condition, and, unless prevented by any stoppage from the temporary break-down of any of the machinery (in which case it should be compulsory on them forthwith to repair such machinery so as not to allow any stoppage in the sewers or drains), to cause the pumps, engines, and apparatus to be used during such a portion of every twenty-four hours as to admit of the free flow of the sewage and waste water through the sewers and drains, so that the same might not at any time be stopped up. They agreed also to indemnify the board from all legal proceedings which might be brought against them with reference to the works, or to the purification of the sewage. The company also agreed forthwith to grant to the board license to use *Anderson's* patent, and the company were to be at liberty to use *Bright's* patent for the purpose of drying manure at the works so far as the board could legally grant the same.

The Defendants accordingly purchased a piece of ground and conveyed the same to the Plaintiffs.

By an indenture dated the 25th of March, 1873, and made

between the board of the one part, and the company of the other part, the board demised to the company the above land, sewage works, steam engines, machinery, and premises, for fourteen years from the 24th of June, 1872, at a yearly rent of £10, and the company entered into covenants with the board in terms corresponding with those of the above-stated agreement. They also covenanted to make all such other alterations in the works as should from time to time be necessary for the proper treatment and disposal of the sewage. There was a proviso for re-entry on breach of any of the covenants.

The bill alleged that in December, 1874, the Defendants, instead of properly treating the sewage, discharged large quantities of it into the *Anker*, and greatly polluted the river, and that in consequence legal proceedings were threatened against the Plaintiffs, particularly by the representatives of one *Kirkby Fenton*, deceased, who threatened to enforce a decree for an injunction obtained by *Fenton* on the 10th of July, 1869, restraining the Defendants from polluting the water of the river in its course through the estate of the Plaintiff in that suit.

On the 18th of December, 1874, notice by the clerk of the Plaintiffs was served on the Defendants, requiring them to erect certain buildings and to make such alterations and improvements in the works as were necessary for the proper treatment and disposal of the sewage, and threatening proceedings. The bill alleged that notwithstanding such notice the Defendants had not executed any of the works, and on the 15th of February, 1875, the Plaintiffs commenced an action of ejectment.

The bill alleged that the quantity of sewage and other matters passing through the sewers, and which ought to be properly treated and purified, was 225,000 gallons a day, and that the Defendants' works were too small to treat successfully so large a quantity. Instead of treating and purifying the whole, the Defendants had adopted the plan of only pumping out a part, namely, about 150,000 gallons a day, and of damming up or heading back the rest, amounting to from 75,000 to 80,000 gallons a day, into the sewers and drains belonging to the Plaintiffs. The result was to keep the outfall sewer fully charged with sewage the whole of the night and a great part of each day, and to drive the

V.-C. B. 1875

NUNEATON LOCAL BOARD v. GENERAL SEWAGE CO.

sewer gas back into the town, where it found vent and escaped at the various manholes and into the houses.

The bill prayed that the Defendants might be restrained "from causing or permitting the said sewage and other refuse matters to remain in the sewers or drains of the Plaintiffs, so as to be or become or cause a nuisance, damage, or annoyance to the Plaintiffs;" also "from damming or heading back into the sewers or drains of the Plaintiffs the said sewage or refuse matter, and from preventing the free flow of the said sewage and waste water through the said sewers or drains of the Plaintiffs."

The Defendants demurred for want of equity and want of parties.

Mr. *Jackson*, Q.C., and Mr. *Cookson*, for the demurrer:—

The bill is based on the theory that the Defendants have not carried out their agreement with the Plaintiffs. But the Court cannot enforce specific performance of such an agreement as this.

It is true that the bill does not in terms pray specific performance, but it asks for an injunction, which could, if granted, be carried out only as a decree for specific performance could be carried out. "But if an agreement affirmative in form is of such a nature that it cannot be specifically enforced, and the application for an injunction is in effect and spirit an application for a decree for specific performance, the Court will not import a negative quality into the agreement, but will leave the Plaintiff to his remedy by damages at law": *Kerr* on Injunctions (1).

In a case where the lessee of an inn had covenanted to use and keep open the house as an inn, and also not to do any act whereby the licenses should become forfeited, an injunction which had been granted to restrain the Defendant from discontinuing the business, was dissolved, on the ground that the Court could not compel the tenant of a house to carry on a particular business in it: *Hooper* v. *Brodrick* (2). In *Peto* v. *Brighton, Uckfield, and Tunbridge Wells Railway Company* (3) it was held that the Court has no jurisdiction to decree the specific performance of a contract, for which the consideration on the part of the Plaintiff is the execution of

(1) Page 524. (2) 11 Sim. 47.

(3) 1 H. & M. 468.

certain works which the Court is unable to superintend. That is precisely this case. The Court, here, cannot possibly keep the pumps going, or see that the scientific operations are properly carried out.

Apart from jurisdiction, the Plaintiffs have no *locus standi*. A private person may sue in respect of a public nuisance when the injury is special to him; but there is no case to be found in which a local board has been allowed to sue in respect of a public nuisance, without shewing some private injury, and alleging some special damage.

In *Stockport District Waterworks Company* v. *Corporation of Manchester* (1) a waterworks company at *Stockport* prayed against the Corporation of *Manchester* and another waterworks company at *Stockport*, for a declaration that an agreement was illegal and void, whereby the former Defendants agreed to sell part of their water supply to the latter; and for an injunction. Lord *Hatherley*, then Vice-Chancellor *Wood*, dismissed the bill. He said that if he had had the Attorney-General there as informant, he should probably not have hesitated to grant the injunction. But this was only the suit of a rival company; the Plaintiffs were not qualified to represent the public. So here, we say, the suit should have been by the Attorney-General on behalf of the public. The nuisance complained of, if a nuisance at all, is especially a public nuisance. The principle was laid down by Lord *Hardwicke* in *Baines* v. *Baker* (2). There an owner of house property in *Coldbath Fields* sought to restrain the Defendants, who claimed under one of his lessees, from establishing a small-pox hospital in that locality, and the Lord Chancellor said: "Bills of this sort are founded upon being nuisance at common law. If a public nuisance, it should be an information in the name of the Attorney-General, and then it would be for his consideration whether he would file such an information or not."

[*Vestry of Bermondsey* v. *Brown* (3) was also referred to.]

Mr. *Kay*, Q.C., and Mr. *Method*, for the Plaintiffs, were not called upon.

(1) 9 Jur. (N.S.) 266. (2) Amb. 158, 159.
(3) Law Rep. 1 Eq. 204.

V.-C. B. 1875

NUNEATON LOCAL BOARD v. GENERAL SEWAGE CO.

SIR JAMES BACON, V.C.:—

The argument for the demurrer, first of all, sought to turn this bill into a bill for specific performance, which it is not; so that part of the case may be laid aside.

The Plaintiffs are the *Nuneaton* Local Board of Health, intrusted with the public health to a very considerable extent, and having the property of the sewers in them. The bill states that the Plaintiffs have intrusted the direction and conduct of the sewers to the Defendants upon certain terms, which are expressed in the agreement and in the lease. The bill could not have been properly framed if it had omitted all mention of those terms. From the bill, then, it appears that the local board of health being the directors, governors, and proprietors of these sewers, trust the Defendants to carry on the operations in connection with the sewerage upon terms which are clearly expressed, but with which, for the present, I have nothing to do, except to observe that the Defendants, by their demurrer, adopt those statements, and every other statement of fact contained in the bill.

The bill states that the Defendants improperly dam or head back the residue of the sewage, which amounts to 75,000 gallons a day, into the sewers and drains belonging to the Plaintiffs. It is said in argument that the Plaintiffs' property is not invaded or affected in any way. The complaint is, in express terms, that the Defendants have done a wrongful act by damming up sewage in the Plaintiffs' drains, which pass through a town of considerable extent, and that such sewers and drains are now, in consequence, filled with sewage and other refuse matter.

The demurrer of the Defendants is that a Plaintiff who makes statements of this kind in his bill, if these are all, has no equity or right to ask for any relief, or for the protection of this Court. In my judgment it is unnecessary to carry the case further. The authorities which have been referred to do not, in my opinion, cover or even apply to this case. In the case of *Hooper* v. *Brodrick* (1), where a man had taken a lease of a public-house, and had undertaken that he would keep it open, and that he would do nothing to avoid the license, it was held, although he did not keep the public-house open, yet that, having done nothing to

(1) 11 Sim. 47.

avoid the license, he had not made himself liable to be made a Defendant in a suit such as was there instituted. But the judgment in that case was, that if he had infringed any of the negative provisions of that deed, he would have been liable to be restrained by the injunction which the Plaintiff prayed against him. In the other case of *Peto* v. *Brighton, Uckfield, and Tunbridge Wells Railway Company* (1), where the Plaintiff was entitled to be paid in debentures and shares of the company, it was held that he could not sustain a bill for specific performance of a contract, where the consideration moving from him was an undertaking to perform certain works over which the Court was unable to exercise complete control. What possible relation either of those cases has to the one before me I am at a loss to conceive.

The allegation in the bill that the property of the Plaintiffs, entrusted by them to the Defendants on certain conditions, has been so used and dealt with as to create the nuisance which is here described, is admitted by the Defendants.

The argument that the Attorney-General ought to be a party to the suit, which was supported by the case of *Vestry of Bermondsey* v. *Brown* (2), to which Mr. *Cookson* last alluded, need not, in my opinion, be referred to here. The day may possibly come—whether it will or not I do not say—when the question, whether a corporation, created by statute to discharge such duties as a local board of health are created to fulfil, may or may not file a bill to restrain the infringement of a public right, with or without the Attorney-General, will have to be decided. Upon that question at present I give no opinion.

But upon the allegations in this bill, the Plaintiffs are, in my opinion, entitled to sustain a suit in this Court. This is all I have to do with at present, for the motion for an injunction has not yet been opened.

When the Plaintiffs say, moreover, that the consequence of what the Defendants have done is to create a public nuisance, the Court will not listen to the complaint with indifference. The existence of a public nuisance under these circumstances is a matter to be attended to—at least, it is not by saying that if you come only to

(1) 1 H. & M. 468. (2) Law Rep. 1 Eq. 204.

V.-C. B. 1875

NUNEATON LOCAL BOARD v. GENERAL SEWAGE CO.

prevent a public nuisance, you must come under the wing of the Attorney-General, that such an allegation can be got rid of.

In my opinion, there is no ground in law, or in sense, or in justice, upon which this demurrer can be supported, and I therefore overrule it.

Mr. *Kay*, Q.C., and Mr. *Methold*, then moved for the injunction.

Mr. *Jackson*, Q.C., and Mr. *Cookson*, opposed.

At the close of the arguments,

The VICE-CHANCELLOR asked the Defendants' counsel if they were in a position to make any offer which might be accepted by the Plaintiffs, and was informed that they were not instructed to make any offer.

SIR JAMES BACON, V.C:—

Then I can do nothing but grant the injunction; because there is, as I just now said, a plain stipulation in the shape of a contract between the parties. But I am not now enforcing the contract. I am dealing with matters of fact. It is evident from the facts before me that if the Defendants pump for twenty-four hours, all the evil which the Plaintiffs say they are suffering will be removed. I cannot attend to the suggestion that the sewers are either too small or imperfectly constructed, or that the Plaintiffs send down more water than they did before. I do not know how that is; I have heard no facts which lead me to believe that the Plaintiffs have any power to send down any more water, or that the new buildings and works which have been referred to make any difference. I find between the parties a contract negotiated by Dr. *Anderson*, a person who must be taken to be conversant with the subject, who lives as near to *Nuneaton* as *Coventry*, and who has had plenty of opportunity of considering this subject. The contract makes a provision that there shall be pumping for a certain time, which in the estimation of the parties, including Dr. *Anderson*, would be enough to get rid of all the water which could come in the shape of sewage or otherwise. The agreement was come to;

and one of the stipulations is, that the Defendants shall make such additions as shall be requisite, and that a piece of land shall be provided, consisting of two acres at least, for the purpose of carrying out the works which were contemplated at the time the contract was entered into. It is not too much to say that this additional piece of land is sufficient for more extensive works than existed before.

Now, what can I do? I have listened to all that Mr. *Jackson* and Mr. *Cookson* have said. The Defendants seem to say tha they have made a bad bargain. I cannot help the Defendants in that. All I can do is to say in the interests of the Plaintiffs—I do not scruple to say in the interests of the public health—that it is indispensably necessary that the present condition of things shall not be allowed to remain. I think, therefore, the injunction must go.

[The injunction was granted in the terms of the prayer as extracted above.]

In answer to an application from Mr. *Jackson* that the injunction might not issue immediately, lest it should prejudice the result of a decision which might possibly be contrary in the event of an appeal,

SIR JAMES BACON, V.C., said:—

It would be improper for me to accede to your application, for this plain reason: I have it in evidence before me, that you can, if you like, remove the inconvenience complained of. If the injunction has the effect of compelling you to do that which you can easily do, I do not see that you have any reason to complain of it —I mean as to the period at which it is issued—or that it will occasion any injustice or even inconvenience to the Defendants. It is in your power to prevent the injunction being burdensome to you, even if it should turn out to be ever so wrong upon appeal.

Solicitor for the Plaintiffs: Mr. *Fluker*, for Mr. *Estlin*, *Nuneaton*.

Solicitor for the Defendants: Mr. *R. S. Gregson*.

V.-C. H.
1875
April 16.

## HICKMAN *v.* UPSALL.

[1859 U. 16.]

*Tenant for Life—Mortgage—Presumption—Evidence of Death or Life—Person not heard of for Seven Years—Onus Probandi.*

2 App Cas 490 14 Ch D 547

A tenant for life entitled beneficially under a will assigned her interests to secure the repayment of certain advances, and the premiums on policies on her life. At the end of March, 1866, a small sum of money—usually paid quarterly—was paid to her. Shortly afterwards she went on a pedestrian tour, and had never been heard of since. The small sum which became payable at the end of June was never applied for:—

*Held*, that the presumption was that she was dead; that on the evidence she could not be presumed to have died before June, 1866; but that she must be taken to have died soon after June, 1866.

### PETITION.

In 1859 *Sophia Hickman*, then *Sophia Upsall*, who was interested beneficially, for life, under the will, dated in January, 1851, of *John Upsall*, who died in November, 1851, instituted a suit for the purpose of making the trustees liable for not getting in and investing a certain debt; and of having the trusts of the will administered by the Court. There was a gift over of the same property after the death of *Sophia Hickman* to the Petitioners. *Sophia Hickman*, in July, 1859, assigned to *C. M. Samson* her life interests under the will, and also a policy of assurance on her life, to secure the repayment of money lent to her, and interest. The same beneficial interests were further charged and two new policies were assigned in August, 1859, and January, 1860, by her to secure other sums lent by *C. M. Samson*.

On the hearing of the cause Vice-Chancellor *Stuart* ordered payments to be made during the life of *Sophia Hickman*, or until further order, of moneys and rents to which she was entitled for life under the will, to be made to *C. M. Samson* in discharge of the interest that might accrue due on the moneys lent, and the premiums on the policies mortgaged by her.

*Sophia Hickman*, on the 25th of March, 1866, left her home, stating that she was going on a pedestrian tour in *Lincolnshire*. She was at the time upwards of fifty-two years of age, and appa-

S C on appt 2 Ch D 617. 46 LJ 145 Ch.
(1) 2 Giff 124-6 Jur NS 367

rently of sound mind; she had but a small sum of money with her, and she gave no clue as to the precise route which she intended to take. She was never heard of again. Advertisements were inserted in several public newspapers offering rewards for any information respecting her, but without any result, and she had never since been heard of.

This was a Petition by the persons entitled to the property expectant on the death of *Sophia Hickman* for the purpose of having, after providing for the costs, certain sums standing to "the account of the personal estate of the persons expectant on the death of *Sophia Hickman*," subject to duty on her death, transferred and paid to them, and the proceeds of certain leaseholds paid to them according to their respective interests therein.

The Vice-Chancellor, when the Petition came on to be heard on the 5th of March, 1875, ordered it to stand over for a month, and directed inquiries to be made for *Sophia Hickman* of the officials at certain workhouses, lunatic asylums, and other places in the metropolis and the country at which she might have received relief, or been heard of, or known. Those inquiries were made, but without eliciting any knowledge of her existence since the time above mentioned. The evidence shewed that some small sums of £5 or less were paid to *Sophia Hickman* by the solicitor of the mortgagee, usually quarterly, but sometimes monthly; that a quarterly payment was made to her at the end of March, 1866, and that another quarterly payment would have been made to her at the end of June, 1866, had she applied for it; she knew that she could receive it, but she had never applied for any further payment.

Mr. *E. Cutler*, for the Petitioners:—

In *In re Beasney's Trusts* (1) the same sort of question arose as in this case. The onus is upon the mortgagee to prove affirmatively that *Sophia Hickman* is alive, just as if he were moving actively to enforce his rights as mortgagee. It is not the duty of the Petitioners to prove the death of the tenant for life. The case of *In re Henderson's Trusts*, referred to in that case, is also in point. The decision in *In re Phené's Trusts* (2) shews that it is the

(1) Law Rep. 7 Eq. 498. (2) Law Rep. 5 Ch. 139.

V.-C. H. 1875. HICKMAN v. UPSALL.

duty of the mortgagee to prove that *Sophia Hickman* is alive. If a person in destitute circumstances does not apply for money which he knows is due to him, and that it would be paid on application for it, there must be some strong reason for it. It may be said that the decision in *In re Phené's Trusts* (1) is a negative one in favour of the Petitioners, but certainly that in *In re Beasney's Trusts* (2) is a positive one in their favour, and according to it the mortgagee ought to prove the life at the time when he claims to be paid the income. I submit that upon the evidence the Petitioners are entitled to an order.

Mr. *Greene*, Q.C., and Mr. *Method*, for the mortgagee :—

The evidence is clear that *Sophia Hickman* was actually paid by the solicitor of the mortgagee a sum of £5 at the end of March, 1866. It cannot be said that the presumption of her death is conclusive, as, according to the rule laid down in *Doe* v. *Nepean* (3), there can be no such presumption until seven years have elapsed. There can be no presumption during the seven years; on the contrary, there must be direct proof, and the onus is thrown upon the person who wishes to establish the precise time of death; and that is this case, the circumstances of which are very different from those in *In re Beasney's Trusts*, for though *Sophia Hickman* received the March payment, and did not apply for the one which became due at the end of June, that is not sufficient, considering her peculiar habits and mode of life. The case of *In re Benham's Trusts* (4) is also in favour of the mortgagee. In *In re Phené's Trusts* Lord Justice *Giffard* said (5) that "the onus of proving death at any particular period within the seven years lies with the party alleging death at such particular period," and the decision in *In re Benham's Trusts* is not inconsistent with that, though the order of the Vice-Chancellor in that case was discharged on appeal. There is also the case of *In re Lewes' Trusts* (6), in which it was held that "those who claim under a person who is said to have survived a particular period must

(1) Law Rep. 5 Ch. 139.
(2) Ibid. 7 Eq. 498.
(3) 5 B. & Ad. 86; 2 M. & W. 894.
(4) Law Rep. 4 Eq. 416.
(5) Ibid. 5 Ch. 144.
(6) Ibid. 6 Ch. 356.

prove the fact." Therefore, looking at all the circumstances, the peculiar habits and wandering mode of life of *Sophia Hickman*, her desire to exclude all knowledge in reference to herself from her family, and the holding of herself aloof from them, the applications for money to the solicitor of the mortgagee, and only when she wanted some, it is submitted that the reason why she did not ask for the payment of money at the end of June is sufficiently explained; and that the authorities which require direct proof of death within seven years have not been complied with.

[They also referred to *Thomas* v. *Thomas* (1).]

SIR CHARLES HALL, V.C.:—

I am of opinion that this case is governed by the decisions in *In re Phené's Trusts* (2) and in *In re Lewes' Trusts* (3). I think it is impossible to distinguish a case of presumption of death from one of presumption of life, for whoever has to make out a case in order to establish a title which depends upon the fact of either the death or the life of any person must prove that fact, therefore the mortgagee is in the same position as the Petitioners. The mortgagee claiming to be paid certain income under the order already made must prove the fact of life. That is plainly illustrated by this: that if the property claimed were in Court instead of being under the control of trustees, the order would have been to pay the income to the mortgagee during the life of *Sophia Hickman*, or until further order, and the mortgagee would not have been able to get anything without proving that she was alive; and it is equally incumbent upon the Petitioners claiming the property to prove that she is dead, and when the death took place. They allege that the death took place before June, 1866, and they endeavour to establish that fact by referring to the antecedents and to the poverty of *Sophia Hickman*, and to the fact that she was entirely without any means of living except the small payments made to her quarterly, and from this they infer that she would have applied at the end of June for payment of the small sum paid quarterly if she had been alive. It is proved that no application was made for any money after March, 1866, and certainly the

(1) 2 Dr. & Sm. 298. (2) Law Rep. 5 Ch. 139.
(3) Law Rep. 6 Ch. 356.

V.-C. H. 1875 HICKMAN v. UPSALL.

circumstances of her case are such that it is fair to assume she would, if alive, have made an application for payment at the end of June, 1866, or soon afterwards. I do not think, however, that I ought to presume in favour of the Petitioners who rely upon presumption of death, that she died before the June payment became due; but I do presume that she died soon afterwards, and hold that nothing became payable to the mortgagee after that time. The mortgagee will, therefore, not be entitled to any moneys accruing due after June, and the Petitioners will be entitled to the property and income from that period.

Solicitors: Messrs. *J. & R. Gole;* Mr. *Proudfoot.*

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V.-C. H. 1875 *April* 22.

## REPUBLIC OF PERU *v.* WEGUELIN.

[1872 R. 143.]

## WEGUELIN *v.* REPUBLIC OF PERU.

[1875 W. 20.]

*Jurisdiction—Foreign State—Republic—Corporate Defendants—Pleading—Discovery—Stay of Proceedings in original Suit.*

16 Ch D 174-5. 46 Jur Cas 141

The proceedings in an original suit by a foreign government were stayed until the Plaintiffs in that suit had given the name or names of persons who could be made Defendant or Defendants in a cross suit by the same parties against the foreign government, for the purpose of making upon oath the discovery required.

*United States of America* v. *Wagner* (1) followed.

THE original bill [1872 R. 143], in respect of certain accounts to be rendered by the Defendants, was filed in August, 1872, and the answer of some of the Defendants was filed in August, 1873. The bill was amended in April, 1874, by adding other Defendants, who represented a Mr. *Ball* and the executors of a deceased Defendant. No further answer was required, and none had been filed. On the 6th of March, 1875, the cross bill [1875 W. 20] was filed. Replication in the original suit was filed on the 19th

(1) Law Rep. 2 Ch. 582.

of March, 1875. Interrogatories in the cross suit were filed on the 7th of April, 1875. This was a motion, on a notice dated the 19th of April, 1875, in the cross suit that the Plaintiffs in the original suit might be ordered to name a person or persons who might be made a Defendant or Defendants, for the purpose of making such discovery in the cross suit as might be required, and that in the meantime all further proceedings in the original suit might be stayed. The application made by the Plaintiffs in the cross suit to the Defendants had not been answered in such a manner as to enable them to obtain the discovery required.

Mr. *Fry*, Q.C., and Mr. *Speed*, for the motion.

Mr. *Dickinson*, Q.C., Mr. *Lindley*, Q.C., and Mr. *Kekewich*, *contrà* :—

The demand made by the original bill is for an account which it is alleged the Defendants ought to render to the Republic in reference to a certain amount of commission charged. The question whether there should or should not have been such commission will depend upon a written contract, and written communications, and very little discussion will arise out of anything else. So far as the written documents are concerned, the Plaintiffs in the cross suit have got affidavits of them from the proper persons, and it is submitted that this application is quite unusual. Whether at some time or another it may be proper to make it is not now the question. It is improper at the present time, because the necessity for it can only arise after the answer to the cross suit has been put in in the regular way.

SIR CHARLES HALL, V.C. :—

I am of opinion that this is not a premature application. In the ordinary case of a corporation being Defendants, the Plaintiff is entitled to ask that some officer of the corporation shall be made a Defendant with the corporation for the purpose of giving the discovery which the Plaintiff would get from a private individual in a suit against him—that is, discovery upon oath. The case of a foreign government is the same as that of a corporation, and the ordinary practice applicable to a corporation must be adapted, as

V.-C. H. 1875

REPUBLIC OF PERU v. WEGUELIN.

WEGUELIN v. REPUBLIC OF PERU.

well as it will admit, to the case of a foreign government, whether it be a republic or a sovereignty. Considering the decision in *United States of America* v. *Wagner* (1), I hold that it is a matter of right on the part of the Plaintiffs in the cross suit to have upon oath the discovery in their suit which they seek to obtain, and that for that purpose they are entitled to have named by the Defendants in the cross suit a person or persons to be made a Defendant or Defendants. The mode of proceeding must be the same as that pointed out in *United States of America* v. *Wagner*, and all the proceedings in the original suit must be stayed until the name or names have been given.

Solicitors: Messrs. *Norton, Rose, Norton, & Brewer;* Messrs. *Freshfields & Williams.*

(1) Law Rep. 2 Ch. 582.

## *Ex parte* HICKS. *In re* BALL.

C. J. B.
1875
*April* 19.

*Practice—Time for Appealing—Bankruptcy Rules*, 1870, *rr.* 143, 150—*General Rule of* 26 *May*, 1873.

In computing the twenty-one days within which an appeal must be entered, Sundays are not to be reckoned.

THIS was an appeal from a decision of the Judge of the *Truro* County Court.

The order appealed from bore date the 1st of March, 1875. The notice of appeal was dated the 19th of March, 1875, but it was not served until the 23rd of March. There was evidence on the part of the Respondent that the order appealed from, though dated the 1st of March, had been actually pronounced by the Judge on the 26th of February. This evidence was, however, contradicted by evidence on the part of the Appellant.

Mr. *Finlay Knight*, on behalf of the Appellant, opened the appeal.

Mr. *Northmore Lawrence*, for the Respondent, objected that the appeal was too late: *Bankruptcy Rules*, 1870, r. 143 (1).

Mr. *Finlay Knight* contended that, *primâ facie*, the date of the order was the date when it was pronounced. At any rate, as there was a dispute, the matter should be referred back to the County Court to certify the actual date of the pronouncing of the order.

SIR JAMES BACON, C.J.:—

According to the General Rule of the 26th of May, 1873 (2),

(1) Rule 143: "An appeal against a decision or order of the Chief Judge in Bankruptcy, or a Judge of a County Court, shall be entered with the Registrar of Appeals within and not later than twenty-one days from the said decision or order, by leaving with him a copy of the appeal notice of motion."

(2) Rule 150 of 1870: "The office for entering bankruptcy appeals to be heard by the Court of Appeal in Chancery shall be closed during the ordinary vacations of the Court of Chancery, and the time during which such office shall be closed shall not be reckoned in the number of days ordered for the enter-

C. J. B. 1875 *Ex parte* HICKS. *In re* BALL.

Sundays are not to be counted in computing the twenty-one days. The appeal is, therefore, in time.

The appeal was then heard upon its merits, and the order of the County Court was discharged.

Solicitors for the Appellant: Messrs. *Surr, Gribble, & Bunton,* agents for Messrs. *J. E. Elworthy, Curtis, & Dawe, Plymouth.*

Solicitors for the Respondent: Messrs. *Emmet & Son,* agents for Mr. *H. F. Whitefield, St. Columb.*

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ing of appeals to be heard by such Court of Appeal in Chancery."

The General Rule of the 26th of May, 1873, rescinds Rule 150 of 1870, and provides: "The office for entering bankruptcy appeals shall be open daily throughout the year, from ten till four o'clock, except on Sunday, Christmas Day, Good Friday, the Saturday after Good Friday, Monday and Tuesday in Easter Week, or any day appointed for a public fast or thanksgiving, and except also on Saturdays, when the office may be closed at two o'clock; and the days on which the office shall be wholly closed shall not be reckoned in the number of days ordered for the entering of appeals."—*Vide* 17 Solicitors' Journal, 715.

## LEADER *v.* MOODY.

M. R.
1875
April 30.

[1875 L. 50.]

*Lease of Theatre—Underlease of Stalls—User of Theatre for other than Theatrical Purposes—Derogation from Grant.*

The lease of a theatre contained a covenant on the part of the lessee not to convert the theatre, or any part thereof, to any other use than for acting or performing of operas, plays, concerts, balls, masquerades, assemblies, and such theatrical and other purposes as had been usually given therein. The lessee, for valuable consideration, sub-demised certain boxes and pit stalls, together with free and uninterrupted admission into, and egress and regress to and from, and the full use and enjoyment of such boxes and stalls during all such nights as the theatre should be open for the reception of audience or company to any public performance or exhibition of any opera or any entertainment whatsoever of or upon the stage, except balls or masquerades, to the plaintiff for a term of years, reserving full right of access to the boxes and stalls for the purposes of repair. The underlease contained a covenant for quiet enjoyment of the demised premises: but no covenant on the part of the grantor of the underlease to observe or perform the covenants of the original lease. Afterwards the lessee of the theatre agreed to let it for a term of three months for the purpose of holding religious meetings. In order that the theatre might be converted into a convenient place for holding such meetings, the divisions between the boxes were removed, and the pit (including the site of the Plaintiff's stalls) was boarded over; but these alterations were not permanent, and the parties disclaimed any intention of using the theatre for religious services beyond the three months:—

*Held*, that without the Plaintiff's consent the theatre could not be converted to other than theatrical purposes, nor could the original lessee, or any person claiming under him, enter on the Plaintiff's boxes or stalls: but that, under the circumstances, the proper remedy was in damages, and not by way of injunction.

BY a lease dated the 10th of July, 1845, *Her Majesty's Theatre* in the *Haymarket* was demised to *B. Lumley* for a term of years, to expire on the 29th of September, 1891, subject, however, to certain prior leases of boxes in the theatre. The lease of the 10th of July, 1845, contained a covenant on the part of the lessee not to convert the theatre, or any part thereof, to any other use than for acting or performing of operas, plays, concerts, balls, masquerades, assemblies, and such theatrical and other public diversions or entertainments as had been usually given therein,

M. R. 1875 LEADER v. MOODY.

but to use his utmost endeavours to improve the same for that use and purpose.

The term created by the lease of the 10th of July, 1845, was afterwards assigned to and became vested in Earl *Dudley*.

The Plaintiff was entitled in possession to certain boxes and pit stalls in the theatre. As to one of these boxes, he claimed to be entitled under or by virtue of a lease thereof prior in date to the 10th of July, 1845; and as to the rest of the boxes, and the whole of the pit stalls, he was entitled under or by virtue of underleases thereof granted by *Lumley* or Earl *Dudley*. These underleases were granted in consideration of the payment of considerable sums of money, amounting in the whole to not less than £10,000.

The underlease of twelve of the stalls was dated the 28th of July, 1862, and was made between Earl *Dudley* of the one part, and *William Watkins* of the other part, and after recitals shewing the consideration for which the underlease was granted, it was witnessed as follows:—

"Now this indenture witnesseth that in pursuance of the said agreement, and for the considerations aforesaid, he, the said Earl, doth hereby grant and demise unto the said *William Watkins*, his executors, administrators, and assigns, all those twelve several pit stalls in the theatre known by the name of *Her Majesty's Theatre*, situate in the *Haymarket*, in the parish of *St. James*, within the liberty of *Westminster*, and marked or distinguished by the numbers 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, and 100, and being in the fourth row of pit stalls from the orchestra in the said theatre, together with free and uninterrupted admission at all seasonable times into, and egress and regress to and from, and the full use and enjoyment of such several stalls by tickets of admission thereto in the usual manner of subscription tickets during all such nights as the said theatre shall be open for the reception of audience or company to any public performance or exhibition of any opera or entertainment whatsoever of or upon the stage (except balls and masquerades), and all profits, advantages, and appurtenances to the said stalls respectively belonging or appertaining from the performances and exhibitions aforesaid, except and with the restriction aforesaid, and except nevertheless and reserved unto the said Earl, his executors, administrators and

assigns, and all persons whom he or they shall authorize, full power and authority of access to, from, and upon the said stalls and premises hereby demised at all times (except during the performances of any such opera or other entertainment as aforesaid), for the purpose of painting, repairing, refitting, ornamenting, or cleansing the same respectively, and the parts of the said theatre adjacent thereto respectively; to hold the said stalls and premises respectively expressed to be hereby demised unto the said *William Watkins*, his executors, administrators, and assigns, from the 29th day of September, 1862, for and during and unto the full end and term of twenty-nine years (wanting fourteen days) from thence next ensuing, and fully to be complete and ended, yielding and paying therefor unto the said Earl, his executors, administrators, or assigns, the rent of a peppercorn on the 29th day of September in every year of the said term, if the same shall be lawfully demanded; and the said Earl for himself, his heirs, executors, and administrators, hereby covenants with the said *William Watkins*, his executors, administrators, and assigns, that the said *William Watkins* shall and may henceforth during the said term of twenty-nine years (wanting fourteen days) peaceably hold, use, and enjoy the said stalls and premises, and take the rents and profits thereof, and every part thereof respectively, for his and their own benefit, without any interruption from the said Earl, his executors or administrators, or any other person now or hereafter rightfully claiming any estate or interest in the premises from or under him or the said Earl, his executors or administrators. And the said *William Watkins* for himself, his heirs, executors, and administrators hereby covenants with the said Earl, his executors, administrators, and assigns, that he, the said *William Watkins*, his executors, administrators, or assigns, will not at any time hereafter make any alteration in or about any of the said stalls or the the appurtenances thereof, or remove any partition or other article or thing in or adjoining to or constituting part of the said stalls and premises respectively, and will not alter or change the furniture and fittings of any of the said stalls, or make any addition to the furniture and fittings of the same respectively, so as to interfere with or impair the general uniformity of the other pit stalls of the said theatre, and will not do or suffer any act or

M. R. 1875 LEADER v. MOODY.

thing which may be to the nuisance and injury of the said theatre, or any audience therein, or may hinder or obstruct the due performance or exhibition of any opera or entertainment, or the enjoyment thereof by the rest of the audience, but will use the said stalls respectively for the purpose only of viewing and hearing therefrom the operas and other entertainments (not being balls or masquerades), and at no other time than during the performance or exhibition of some opera or entertainment (not being a ball or masquerade), and that the said *William Watkins*, his executors, administrators, or assigns, and all persons using the said stalls, or either of them, shall and will in all respects conform to the regulations for the time being of the said theatre. And further, that the said *William Watkins*, his executors, administrators, and assigns, will permit the said Earl, his executors, administrators, and assigns, and all persons whom he or they shall authorize, to have free access to, from, and upon the said stalls and premises respectively hereby demised (excepting during the time of performance of any such opera or other entertainment as aforesaid), for the purpose of painting, repairing, refitting, ornamenting, or cleansing the same."

The other underleases were, with some immaterial variations, in the like form.

Certain of the pit stalls had been mortgaged by the Plaintiff to *Margaret Bell Hollier*.

The theatre was burnt down in 1867. It was subsequently rebuilt, but had never been re-opened as a theatre. Boxes and stalls had, however, been allotted to the Plaintiff by the Earl of *Dudley* in substitution for those in the old theatre.

In March, 1875, Earl *Dudley*, in consideration of a payment of about £1200, agreed with Messrs. *Thomas Stone* and *Robert Paton* to let the theatre (subject to all existing underleases or interests therein) to them for a term of three months from the 20th of March, 1875, and the lessees thereupon agreed that the theatre should be used only for the purpose of the lectures, preachings, or religious meetings of, or presided over, or conducted or appointed by, Messrs. *D. L. Moody* and *I. D. Sankey;* and not for any opera, theatrical performance, or other entertainment of any kind; and the lessees also covenanted to keep Earl *Dudley* indemnified

against the consequences of the demise, or any act or thing done or suffered to be done by the lessees contrary to any of the covenants or provisions contained in the lease of the 10th of July, 1845.

The consent of the persons entitled to the theatre in reversion expectant on the determination of the term created by the lease of the 10th of July, 1845, to the underlease to Messrs. *Stone* and *Paton*, was duly obtained by them.

In order to convert the theatre into a place convenient for holding of services by Messrs. *Moody* and *Sankey*, the divisions (consisting of boards sliding in grooves) between all the boxes were removed; and the entire pit of the theatre (including the site of the pit-stalls allotted to the Plaintiff) was boarded over, so as to make a new floor at the same level as the front of the stage. This boarding was of a temporary nature, and could easily be removed in a few days.

On the 31st of March, the Plaintiff, whose consent to the underlease to Messrs. *Stone* and *Paton* had not been obtained, filed the bill in this suit. The bill was subsequently amended, and as amended was against Messrs. *Moody*, *Sankey*, *Stone*, and *Paton*, Earl *Dudley*, and *Margaret Bell Hollier*, as Defendants, and prayed for injunctions to the following effect: first, to restrain Earl *Dudley* from making any demise of the theatre to the Defendants *Moody*, *Sankey*, *Stone* and *Paton*, or any of them, for the purpose of such theatre being used as a place for preaching or religious lecturing, or for singing in connection therewith; secondly, to restrain the Defendants *Moody*, *Sankey*, *Stone*, and *Paton*, and their workmen and agents, from boarding over or covering the sites of the stalls belonging to the Plaintiff, and from removing the divisions which separated the Plaintiff's boxes from the other parts of the theatre, and from going upon the Plaintiff's boxes and stalls, or the sites thereof, and to restrain Earl *Dudley* from permitting the Defendants *Moody*, *Sankey*, *Stone*, and *Paton*, and their workmen and agents, from having access to the theatre for the purpose of doing any such act as aforesaid; thirdly, to restrain the Defendants *Moody*, *Sankey*, *Stone*, and *Paton* from allowing the boarding erected by them to continue so as to cover up the Plaintiff's stalls, and from allowing the divisions which separated the Plaintiff's boxes

M. R. 1875 LEADER v. MOODY.

from other parts of the theatre to remain removed; fourthly, to restrain the Defendant *Moody* from preaching or delivering religious lectures in the theatre, and the Defendant *Sankey* from assisting him; fifthly, to restrain the Defendants *Moody*, *Sankey*, *Stone* and *Paton*, from inviting persons by advertisements and otherwise to come upon the Plaintiff's boxes and stalls or the sites thereof; and, sixthly, to restrain the Defendant Earl *Dudley* from converting or allowing other persons to convert the theatre to any other uses than those specified in the lease of the 10th of July, 1845.

A motion for an injunction according to the prayer of the bill was made, and by consent was turned into motion for decree, and the cause now came on to be heard accordingly.

It appeared from the evidence that the divisions of the Plaintiff's boxes had been restored subsequently to the institution of the suit, but that the boarding still remained over the pit. The Defendants disclaimed any intention of continuing services in the theatre after the expiration of three months.

Mr. *Chitty*, Q.C., and Mr. *Caldecott*, for the Plaintiff:—

First, the acts of the Defendants amount to a continuing trespass as regards all the Plaintiff's boxes and stalls, and to a disturbance of the Plaintiff's right of egress and regress to and from the pit-stalls, and the Court will interfere to restrain such acts: *Goodson* v. *Richardson* (1).

[The MASTER OF THE ROLLS:—It is extremely difficult to say what is the precise legal effect of the underlease of the 28th of July, 1862.]

We say that it operates as a demise to us of the stalls for all purposes, and a regrant by us to Lord *Dudley* for balls and masquerades. But, whatever may be the true legal effect of the underlease, the Plaintiff is in possession under it; he has an equitable title only, the legal interest being outstanding in his mortgagee, and under these circumstances he is clearly entitled to maintain a suit to restrain a trespass and disturbance of his easement as regards these stalls. As regards the boxes, he is legal

(1) Law Rep. 9 Ch. 221.

owner, no doubt, but he is also in possession, and therefore he may maintain a suit to restrain a continuing trespass, accompanied by a claim of title.

Secondly, the acts complained of are directly in breach of the covenant for quiet enjoyment, and ought therefore to be restrained: *Tipping* v. *Eckersley* (1); *Whatman* v. *Gibson* (2); *Western* v. *Macdermott* (3).

[The MASTER OF THE ROLLS:—The covenant does not, even in terms, go beyond the demise; consequently, according to the decision in *Leech* v. *Schweder* (4), unless you can shew that the right you claim falls within the terms of the demise, you cannot succeed on the covenant.]

Thirdly, the acts complained of are distinctly in derogation from the grants contained in the underleases. The Plaintiff has obtained demises of boxes and stalls in a theatre; he has expended large sums in obtaining those demises, and it is not competent for the lessor, after he has obtained the benefit of these sums, to convert the building into something totally different from a theatre. On the contrary, the lessor is bound to keep the building in such a condition that it may at any moment be used as a theatre.

THE MASTER OF THE ROLLS:—In case I shall be of opinion that, under the circumstances, an injunction ought not to be granted, does the Plaintiff claim substantial damages?

Mr. *Chitty*:—The Plaintiff's only object is to try the question of right, and if that is determined he will be content with nominal damages.

The MASTER OF THE ROLLS:—In that case, if the Defendants state that they do not intend to continue to use the theatre beyond the three months, I will make a decree for nominal damages and costs, but will not grant an injunction.

Mr. *Fry*, Q.C., and Mr. *Locock Webb*, for the Defendants *Moody*, *Sankey*, *Stone*, and *Paton*, expressed their willingness to submit to that decree.

(1) 2 K. & J. 264.
(2) 9 Sim. 196.
(3) Law Rep. 2 Ch. 72.
(4) Ibid. 9 Ch. 463.

M. R. 1875 LEADER v. MOODY.

Mr. *Davenport*, for Earl *Dudley*.

SIR G. JESSEL, M.R.:—

In my opinion the Plaintiff is entirely right, though, for the reasons I am about to give, I am not going to grant an injunction.

As I understand it, the meaning and effect of the instrument about which there has been so much discussion, is this: Earl *Dudley* represents that he has a lease of a theatre containing covenants that it shall not be used for any other purpose except as a theatre, with the exception of balls and masquerades. Having a lease of a theatre, he takes money from the Plaintiff or his predecessors in title for leases or sub-demises of boxes and stalls; and though I am free to confess I think if some of these questions which have now been raised had been present to the draftsman's mind, the instrument might have been more carefully and accurately framed, I have no doubt that in substance it is a lease of the boxes and stalls for all theatrical purposes, if I may say so; and, in addition, it is a legal demise of the boxes and stalls themselves.

Now, what is the meaning of such a demise? It surely never could be contended that the man who had taken money for boxes and stalls in a theatre, could the day after destroy the theatre, and turn it, for example, into a stable, if he got a license from his superior landlord. It seems to me that would be altogether extravagant. When the lessor covenants for quiet enjoyment of the thing demised as against his own acts, he must mean that he will keep it as a theatre, ready to be used at all times for theatrical purposes, and so as to enable the person who has taken the sub-demise from him to have the benefit of that sub-demise by using the boxes and stalls during theatrical performances. Therefore, I am of opinion that any permanent alteration of the theatre so as to convert it to purposes which are not theatrical, and do not allow of its being used as a theatre, is a breach of a covenant on the part of the lessor which I find clearly implied throughout the indenture of demise.

Again, has the lessor a right to enter upon the boxes and stalls for any purposes except repair, and except (which is I think

implied) to let them to persons desirous of seeing balls and masquerades? Although I do not find the words, I think the meaning is, that in the excepted case the lessor has a right to let the boxes and stalls to persons desirous of viewing or taking part in masquerades and balls; but subject to that implied reservation, and subject to the express reservation for the purpose of repair, I think he has no right to enter upon the boxes and stalls at all, and that his doing so without the leave or permission or license, as it might be called, of the owner of the boxes and stalls under the sub-demise is a trespass, utterly unwarrantable in law. Whatever may have been the opinion of the advisers of the Earl upon that point, I myself do not entertain any doubt whatever upon it. Consequently on both these points, and they are the two points which have been presented to me, I think the Plaintiff is in the right.

Then, thinking so, why do I not grant an injunction? First of all, as regards the theatre, the alterations are not of a permanent character. Now the question of permanence does not depend only on the nature of the alterations, but on the intention with which they are made. For example, you may have to consider such a case as a locking of a gate, which may be temporary if you intend to lock it for an hour or for five minutes, or it may be a permanent locking, as it was in one of the decided cases, with a view to stop the exercise of a right of way for ever. There the locking of the gate was held by all the Judges to be a permanent obstacle, that being the true intention. On the other hand, you may have the erection of a timber scaffolding, a work of considerable expense, taking a considerable time to erect and a considerable time to remove; but if it were shewn that it was not intended as a permanent construction, but was merely for the purpose of a scaffolding with a view to the erection of something else which would not be an obstruction, and was intended to be taken away as soon as that was completed, there it would be an erection not of a permanent character, that being the intention. Now it is proved, or admitted, before me that there is no intention of keeping this theatre permanently transformed into a meeting-house or a place for religious services; that it is a mere temporary arrangement, although made for a considerable time—

M. R. 1875 LEADER v. MOODY.

three months; that the persons who have taken it have no intention of renewing the arrangement, and the person who has granted the lease has also no intention of renewing it. It appears, also, that the alterations have been carefully made with a view to their removal, and that in no case has any permanent injury been done to the theatre; that they have avoided putting nails or fastenings into the floor of the stage or the floor of the theatre, and, in fact, have avoided doing anything except putting more or less wood, which may be more or less awkward to remove, upon these floors. So that in reality these are temporary structural alterations as distinguished from permanent structural alterations, and I assume on the evidence, and from the circumstances of the case, that they are intended to be removed, as they can be readily removed, at the termination of this three months' lease. Looking at those facts, and considering that the lease began on the 20th of March, and would expire in three months from that time, and that to-day we are at the 30th of April, and considering that by granting an injunction I should be inflicting a great injury on the Defendants, and should be giving no benefit to the Plaintiff, because it appears from the evidence, which is not contradicted, that there is no reasonable prospect of letting the theatre for operatic purposes during the six weeks which have now to elapse, and considering also the power which has been given me by the Act commonly called *Lord Cairns' Act*, of substituting damages for injunction in a case where it appears to the Court that all the circumstances of the case justify such a course, and without laying down, as I have on other occasions abstained from laying down, any general rule which would fetter the exercise of the discretion of the Court, I think, looking at all these circumstances, and considering, moreover, that the object of the Plaintiff is merely to establish his rights (as he has shewn by directing his counsel to ask for only nominal damages in case I wish to give him damages instead of an injunction), I think that I shall be best performing my duty, having regard to these statutory provisions, in awarding damages which, at the Plaintiff's own suggestion, will be nominal only, and with that declaration of my opinion giving him the costs of the suit.

Solicitors: Mr. *J. Aldridge;* Messrs. *Davies, Campbell, & Co.*

## TAYLOR *v.* TAYLOR.

M. R.
1875
May 3, 4.

Applied. Re GEORGE. [1949] 1 Ch. 154

[1871 T. 101.]

*Intestacy—Advancements by Portion—Statute of Distributions* (22 & 23 *Car.* 2, *c.* 10), *s.* 5—*Share of Intestate's Estate—Debt due to Administrator—Set-off.*

An "advancement by portion" within the meaning of sect. 5 of the *Statute of Distributions* is a sum given by a parent to establish a child in life or to make a provision for the child.

Sums given for the following purposes: (1) payment of the admission fee to one of the Inns of Court in the case of a child intended for the Bar; (2) the price of a commission and outfit of a child entering the army; (3) the price of plant and machinery and other payments for the purpose of starting a child in business:—

*Held*, "advancements by portion."

Sums given for the following purposes: (1) payment of a fee to a special pleader in the case of a child intended for the Bar; (2) price of outfit and passage money of an officer in the army and his wife on going out to *India* with his regiment; (3) payment of debts incurred by an officer in the army; (4) assisting a clergyman in paying his housekeeping and other expenses:—

*Held*, not "advancements by portion."

A debt due to the administrator of an intestate in his own right from one of the next of kin may be set off in a suit by the next of kin for administration of the estate against a sum due from the administrator in respect of the next of kin's share of the intestate's estate.

*JOHN TAYLOR*, who died in May, 1856, a widower and intestate, was at the time of his death entitled to considerable real and personal estate. He left two sons, the Plaintiff and Defendant, and no other children him surviving. Letters of administration of the intestate's estate were in June, 1856, granted to the Defendant, the elder of the two sons. In April, 1860, the Defendant submitted an account of the estate to the Plaintiff, shewing that a sum of £8436 7*s.* 8½*d.* was due to the Plaintiff, and the Defendant paid this sum to the Plaintiff accordingly.

In 1871 the Plaintiff filed the bill in this suit for an account of the intestate's estate, alleging that he had recently discovered serious errors in the account which had been rendered by the Defendant. The Defendant, by his answer, admitted one error of considerable amount, but claimed a set-off in respect of certain sums which he had advanced to the Plaintiff subsequently to

M. R. 1875 TAYLOR v. TAYLOR.

April, 1860. By the decree which was made in April, 1873, the usual accounts and inquiries were directed, and a special direction was given as to charging the Defendant with certain items in the account of the testators' personal estate come to his hands; and it was also directed that the amount due to the Plaintiff in respect of the matters aforesaid should be certified, but nothing was said as to the set-off.

The cause now came on to be heard upon two summonses to vary the Chief Clerk's certificate, and upon further consideration.

The question raised upon the summonses was whether certain sums paid by the intestate in his lifetime to or on behalf of the Plaintiff and the Defendant respectively were advancements within the meaning of the *Statute of Distributions* (22 & 23 Car. 2, c. 10), s. 5.

It appeared that the Plaintiff had been entered at the *Middle Temple*, and had begun to read in the chambers of a special pleader with the view of being called to the Bar; the fees payable to the *Middle Temple* and to the pleader were paid by the intestate. The Plaintiff afterwards abandoned the profession of the law, and in 1843 entered the army; and the intestate paid the price of his commission and his outfit. In 1848 the Plaintiff went to *India* with his regiment, and was accompanied by his wife; and the intestate paid the outfit and part of the passage money of the Plaintiff and his wife. While in *India* the Plaintiff became indebted to a considerable amount, and was pressed by his creditors for payment. One of the Plaintiff's fellow officers, at the Plaintiff's request, wrote to the intestate, stating the position of affairs, and representing that it was necessary that the Plaintiff's debts should be paid in order that he might keep his position in the army; and the intestate thereupon paid the Plaintiff's debts to the amount of about £650. In 1854 the Plaintiff sold his commission, and took some ground in *Wales*, with the view of carrying on mining operations there. In 1854 and 1855 the intestate paid to the Plaintiff various sums, amounting to about £850, for the purchase of plant and materials, and payment of wages, for the purpose of carrying on his experiments in searching for minerals. They proved unsuccessful, and were abandoned in June, 1855.

The Defendant entered the Church in 1833; and the intestate

from that time down to his death gave him considerable sums (in some cases amounting to as much as £200 at one time) to assist him in housekeeping and paying expenses of living. These sums were paid by the intestate voluntarily, and not in pursuance of any agreement with the Defendant.

The sums in question were, 1, the sums given to the Defendant to assist him as aforesaid; 2, the entry fee paid for the Plaintiff at the *Middle Temple;* 3, the fee paid to the special pleader; 4, the price of the Plaintiff's commission in the army; 5, the price of the Plaintiff's outfit on entering the army; 6, the price of the outfit and amount of passage money for the Plaintiff and his wife on going out to *India;* 7, the sums applied in payment of the Plaintiff's debts in *India;* 8, the advances made to or for the Plaintiff in connection with his mining operations in *Wales.*

Mr. *Southgate,* Q.C., and Mr. *Oswald,* for the Plaintiff, contended that the allowances made to the Defendant were advancements within the meaning of the statute: *Williams* on Executors (1); *Pratt* v. *Pratt* (2); *Edwards* v. *Freeman* (3); *Boyd* v. *Boyd* (4).

Mr. *Fry,* Q.C., and Mr. *B. B. Rogers,* for the Defendant, referred to *Hender* v. *Rose* (5); *Leighton* v. *Leighton* (6).

SIR G. JESSEL, M.R.:—

I shall not be the first Judge to hold that sums of money given by a father, without covenant, without agreement, not at any definite time, of various amounts, sometimes amounting to £200, sometimes more or sometimes less, given to a curate to aid him in his maintenance, are advancements by way of portion or provision within the statute. I have always understood that an advancement by way of portion is something given by the parent to establish the child in life, or to make what is called a provision for him—not a mere casual payment of this kind. You may make the provision by way of marriage portion on the marriage of the child. You may make it on putting him into a profession or busi-

(1) 6th Ed. vol. ii. p. 1388.
(2) Fitz-Gibb. 284.
(3) 2 P. Wms. 436.
(4) Law Rep. 4 Eq. 305.
(5) 3 P. Wms. 317, n.
(6) Law Rep. 18 Eq. 458.

M. R. 1875 TAYLOR v. TAYLOR.

ness in a variety of ways: you may pay for a commission, you may buy him the goodwill of a business and give him stock-in-trade; all these things I understand to be portions or provisions. Again, if in the absence of evidence you find a father giving a large sum to a child in one payment, there is a presumption that that is intended to start him in life or make a provision for him; but if a small sum is so given you may require evidence to shew the purpose. But I do not think that these words "by portion" are to be disregarded, nor is the word "advancement" to be disregarded. It is not every payment made to a child which is to be regarded as an advancement, or advancement by way of portion. In every case to which I have been referred there has either been a settlement itself, or the purpose for which the payment was made has been shewn to be that which every one would recognise as being for establishing the child or making a provision for the child. In *Edwards* v. *Freeman* (1) the Lord Chancellor says that the payment is to be a provision for the child. [His Honour then read the judgment.] Not every payment is a provision for the child; and I think that Vice-Chancellor *Wood* referred to that when he said, in *Boyd* v. *Boyd* (2), that the sum must be paid for a particular purpose; by which I understand him to mean a special purpose with a view to the establishment of the child in life. I can also remember that was the view always taken in cases (some of which I have argued) arising under the custom of *London*. Nobody thought of taking an account of small sums which a father had given to his children, whether they were under age or over age. I shall, in dealing with this, disallow as advancements by portion all these items.

Mr. *Fry*, Q.C., and Mr. *Rogers*, then contended that the items numbered 2 to 8 were all advancements to the Plaintiff; and they relied on the judgment in *Boyd* v. *Boyd*.

SIR G. JESSEL, M.R., said that nothing could be more productive of misery in families than if he were to hold that every member of the family must account strictly for every sum received from a parent. According to his view, nothing was an advancement unless it were given on marriage, or to establish the child

(1) 2 P. Wms. 436. (2) Law Rep. 4 Eq. 305.

in life. *Primâ facie*, an advancement must be made in early life; but any sum given by way of making a permanent provision for the child would come within the term establishing in life. The entry money at the *Middle Temple* was clearly for the establishment of the child, and must be accounted for; but the payment to the special pleader appeared to be rather in the nature of a payment for preliminary education, and need not be accounted for. The price of the commission and the outfit was an advancement on entering the army, and must be accounted for, but not the price of the outfit for *India* or the passage money, neither of which were payments for the Plaintiff's establishment in life. Again, the sums paid for debts in *India* appeared to be in the nature of temporary assistance; thus, if a child were in business and required further capital, a sum given for that purpose would be an advancement; but a sum given merely to assist him temporarily would not. The sum given to pay the debts in *India* therefore need not be accounted for. On the other hand, the payments in respect of the mining operations in *Wales* appeared to have been made for starting the Plaintiff in business, and ought to be accounted for.

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Upon the further consideration of the cause, the question arose whether the Defendant was entitled to the set-off claimed by the answer.

By a settlement, dated the 25th of November, 1864, the Plaintiff assigned certain property to three trustees, of whom the Defendant was one, upon trusts for the payment of the Plaintiff's debts, and subject thereto for the benefit of the Plaintiff's family. The Plaintiff alleged that the sums in respect of which the set-off was claimed were advanced out of the trust property, and not out of the Defendant's own moneys, and the Chief Clerk's certificate did not find distinctly whether the Plaintiff's contention was or was not in accordance with fact.

Mr. *Rogers*, for the Defendant, submitted that the Defendant was entitled to the set-off claimed, and that an inquiry ought to be directed what part of the sums advanced by the Defendant

M. R. 1875 TAYLOR v. TAYLOR.

on the Plaintiff's behalf were so advanced out of the Defendant's own moneys.

Mr. *Southgate*, Q.C., and Mr. *Oswald*, for the Plaintiff, contended that the Defendant was not entitled to any set-off. First, the debt due from the Plaintiff, being due to the Defendant in his own right, could not be set off against a debt due from the Defendant as administrator. *Whitaker* v. *Rush* (1); *Middleton* v. *Pollock* (2). Secondly, the question of set-off was ripe for decision at the hearing; the decree was silent on the subject, and consequently there could not now be any set-off.

SIR G. JESSEL, M.R.:—

The Plaintiff claims against the Defendant, who is the administrator of the father of the Plaintiff and Defendant, a sum of money on account of his, the Plaintiff's, share of the residue of the father's estate. The Defendant says: "I have lent you large sums of money, exceeding the amount due to you in respect of the residue, which sums have been lent or advanced to you out of my own moneys, and are wholly unpaid. You have come into equity for a personal equitable debt due from me to you. I ask to set off a personal legal debt due from you to me." It seems to me to be clear, on every principle of equity, on every principle of common sense and common justice, and on every principle derived by analogy from the *Statute of Set-off*, or otherwise, that the Defendant, if he proves the facts, is entitled to the set-off claimed, and I intend to allow it. It has been said that I am precluded from so doing by the form of the decree; but I do not think I am. The decree has a special inquiry as to what is due from the Defendant in respect of the matters aforesaid, that is, in respect of the share of the residue. The share is not due from him if he is entitled to claim a set-off in this suit, and therefore the decree is not in his way, especially considering he did claim the set-off by his answer. I do not think, however, the certificate is as clear as it might be that these sums were so advanced. It was very fairly

(1) Amb. 407. (2) *Ante*, p. 29.

and candidly admitted, on behalf of the Defendant, that it is ambiguous, and therefore the matter must be sent back for further inquiry.

I have decided that the Plaintiff is entitled to a sum of money, and interest added to it, from the Defendant. That sum of money should be put in the decree; and there will be a declaration that the Plaintiff is entitled to be repaid the sum of money so ascertained, and interest at 4 per cent. from a given day, being the expiration of twelve months from the death of the testator. On the other hand, I shall refer it to Chambers to take an account of what is due from the Plaintiff to the Defendant for principal and interest in respect of advances or loans made by the Defendant to the Plaintiff out of his own moneys. I restrict it to that, because I do not want to go into the trusts of the voluntary settlement. I shall declare that the Defendant is entitled to set off the sums which shall so be found due against the demand of the Plaintiff, and if it shall appear that the sum found due exceeds the demand of the Plaintiff, then I dismiss the bill without costs. If, on the other hand, it shall appear that it is less than the demand of the Plaintiff for principal and interest, then I order the Defendant, within one month after the certificate, to pay the sum which shall be certified to be due upon the balance, with interest to the day of payment; with liberty to apply as to the costs of the suit.

Solicitors: Mr. *W. Moon;* Messrs. *Prior, Bigg, Church, & Adams.*

M. R.

1875

May 8.

## *In re* UNIVERSAL DISINFECTOR COMPANY.

*Winding-up—Company—Proceedings by Creditor—Winding-up Order—Leave to issue Execution—Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *ss.* 87, 163.

4 Ch D. 627.
7 Ch D. 372.
— 663.
18 Ch D 650

A company against which a writ had been issued under the *Bills of Exchange Act* obtained leave to defend the action upon affidavit made by their secretary containing statements to the effect that the Plaintiff in the action was a holder of a stolen bill, and had not given value for it; and that to his (the secretary's) knowledge the company was perfectly solvent. After the Plaintiff had been interrogated in the action, the defence was abandoned and judgment signed; but before the Plaintiff issued execution he received notice that the company had presented a winding-up petition. An order having been made on the petition, the judgment creditor applied for leave to issue execution, on the ground that he had been unfairly delayed in prosecuting his action :—

*Held*, that the case was not one in which leave ought to be given.

Whether leave ought to be given in any case where execution has not been issued previously to the winding-up order, *quære*.

The *Companies Act*, 1862, ss. 87, 163, commented on.

ON the 18th of February Messrs. *Dale, Young, & Co.*, the holders of an unpaid bill of exchange for £500, accepted by the *Universal Disinfector Company, Limited*, issued a writ under the *Bills of Exchange Act* against the company. On the 26th of February the secretary of the company made an affidavit in the action to the effect that he believed the bill of exchange had been stolen and had found its way into the hands of Messrs. *Young, Dale, & Co.*, without any consideration, and that to his knowledge the company was perfectly solvent; and upon this affidavit the company, on the 27th of February, obtained leave to defend the action. On the 9th of March the declaration was delivered. On the 19th of March the company obtained leave to administer interrogatories in the action. On the 23rd of March the company pleaded. Interrogatories were administered on behalf of the company, and in answer the Plaintiffs deposed that they gave full value for the bill. On the 6th of April the Plaintiff joined issue on the pleas. On the 8th of April terms of settlement were proposed by the company's solicitor, but as these were not satisfactory to the Plaintiffs in the action, on the 14th

of April the action was set down for trial. On the 15th of April the company agreed to pay £200 and the costs of the actions at once, and the balance by monthly instalments, the Plaintiffs to sign judgment at once, but not to issue execution until default was made. Default was made in payment of the £200 and costs, and the Plaintiffs in the action threatened to issue execution; but on the 27th of April notice was given to them that a petition to wind up the company had been presented by the company. The Plaintiffs thereupon applied to the Court for leave to give short notice of motion, that they might be at liberty to issue and put in execution a writ of *fi. fa.* against the goods of the company for the amount of the judgment debt, interest, and costs; and leave was given to bring on the motion immediately after the winding-up petition had been heard. An order to wind up the company having this day been made, the motion was brought on.

Mr. *E. Cutler*, for the motion:—

This application is made under the 87th section of the *Companies Act.*

[The MASTER OF THE ROLLS:—That section only applies after a winding-up order has been made; when you gave notice of motion no order had been made; you might have issued execution, and it would have been for the company to apply to restrain you under sect. 85.]

The execution would still have been void under sect. 163; and, at all events, I am now entitled to ask for leave. The case falls within the principles laid down in *In re Great Ship Company* (1); *In re London Cotton Company* (2).

[The MASTER OF THE ROLLS:—In both those cases execution had been issued before the winding-up order was made. Has leave been ever given where execution had not been issued before the winding-up order?]

I know of none; but the principle which is laid down in the cases cited is that leave ought to be given where there have been unfair proceedings on the part of the debtor. Here the com-

(1) 4 D. J. & S. 63. (2) Law Rep. 2 Eq. 53.

M. R. 1875 *In re* UNIVERSAL DISINFECTOR COMPANY.

pany's secretary obtained leave to defend an action on two allegations: first, that the creditors gave no value for the bills, a defence which was afterwards abandoned; and, secondly, that the company was perfectly solvent, which turns out to be untrue. The creditors have been unfairly delayed by these allegations on the part of the company, and ought to have leave to issue execution.

[He also referred to *In re Imperial Steam and Household Coal Company* (1).]

Mr. *Chitty*, Q.C., and Mr. *H. J. Hunter*, for the company, were not called upon.

SIR G. JESSEL, M.R.:—

I understand it to have been decided that, with the leave of the Court, under sect. 87 of the *Companies Act*, 1862, a creditor may issue execution against a company which has been ordered to be wound up, notwithstanding that it is provided by sect. 163 that where any company is being wound up by the Court, or subject to the supervision of the Court, any attachment, sequestration, distress, or execution put in force against the estate or effects of the company after the commencement of the winding-up shall be void to all intents. If it were not for the decisions, it would be very difficult to arrive at that conclusion. There is no inconsistency in saying (as is said in sect. 87) that you shall not commence or proceed with any suit, action, or other "proceeding" (it is true that that is a wide term), without the leave of the Court, and saying (as is said in sect. 163) that certain results of suits, actions, and proceedings shall be void. It appears to me that it would have been quite reasonable to hold that a suit, action, or other proceeding may be commenced or proceeded with although the judgment recovered in such a suit, action, or proceeding cannot be enforced. You may allow the suit, action, or proceeding to go on in order to ascertain the rights of the parties, but at the same time you may say that the rights, when ascertained, are not to be enforced by execution, but only under the winding-up. There is another reason which applies more particularly

(1) 16 W. R. 689.

M. R.
1875
*In re* UNIVERSAL DISINFECTOR COMPANY.

to suits in equity. There are many suits to which a company is a necessary party in which you do not want to enforce any rights against the company. You want to ascertain your rights and enforce them against others. It appears to me that it would be quite possible to read the two sections together without any inconsistency. The words in sect. 87 are negative: they say that no suit, action, or proceeding is to be commenced or proceeded with except with the leave of the Court; but they do not say that if a suit, action, or proceeding is so commenced or proceeded with, the result shall be that the judgment may be enforced as if there were no winding-up. However, it has been decided that under sect. 87 the Court has a discretion to allow "proceedings" against the company to go on, and that the term "proceedings" includes proceeding to enforce judgment.

The next question is, to what class of cases does that apply? I fear that I must leave it to the same tribunal, the Court of Appeal, which has said that the section does apply, to say when it applies. I am at a loss to say in what cases a person who has not issued execution before a winding-up order is made ought to be allowed to issue execution afterwards; and so far as I can discover, there is no case in which such leave has been given. In the case of *In re Lundy Granite Company* (1) Lord Justice *James* says: "The sole object of the Act was to make an equitable provision in the nature of a bankruptcy for the distribution of the effects of the company amongst the persons entitled, but not to alter any other rights which they might acquire during the winding-up." If that be so, why is a judgment creditor to get any advantage in a winding-up which he could not get in bankruptcy? In bankruptcy no preference or priority is given to a judgment creditor.

It is said that the company has deceived the judgment creditor, so that he has been prevented from getting judgment so quickly as he ought. But the winding-up is not for the benefit of any particular creditor, but of the creditors in general, and the argument proves too much; for if, as is alleged, the company was really insolvent when the creditor commenced his action, it would have been the duty of the company to present a winding-up

(1) Law Rep. 6 Ch. 462, 466.

M. R. 1875 *In re* UNIVERSAL DISINFECTOR COMPANY.

petition at an earlier period. It has never been laid down that because a bankrupt kept a creditor at defiance and prevented him from putting his judgment in force, that entitled the creditor to priority.

Without saying, then, that there is no case in which the Court will allow a creditor to issue execution after the winding-up order has been made, I think that the reasons suggested in the present case are insufficient, and that the motion must be refused.

Solicitors: Mr. *J. Scott;* Messrs. *Raven & Curtis.*

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M. R. 1875 *March* 18.

## BAKER *v.* WHITE.

[1875 B. 46.]

*Will—Mixed Devise of Freeholds and Copyholds—Legal or Equitable Estate.*

4 Ch D. 460
7 Ch D. 457
458
20 Ch D. 475

Devise of freeholds and copyholds to *A.* and *B.*, to hold the same to *A.* and *B.*, their heirs, executors, administrators, and assigns, upon trust during the life of *J.* to receive the rents thereof and pay the same to *J.* for life, or otherwise to permit *J.* to receive them; followed by a devise, after *J.'s* decease, to the use of the heirs of his body. The testator appointed *A.*, *B.*, and *J.* executors of his will, and declared that the receipts of his said trustees and executors for any money payable under the will should be a sufficient discharge to any person paying the same:—

*Held*, that *J.* took a legal estate tail in the freeholds, and an equitable estate for life in the copyholds.

*Baker* v. *Parson* (1) dissented from.

*Houston* v. *Hughes* (2) commented on.

### DEMURRER.

The bill was filed by the Plaintiff *James Baker*, who claimed to be devisee under his father's will of certain freehold and copyhold hereditaments thereby devised, for the specific performance by the Defendant of an agreement for the purchase of the said hereditaments.

*Edward James Baker*, by his will, dated the 22nd of August, 1844, after devising his copyhold estate at *Aldershott* to his son

(1) 42 L. J. (Ch.) 228. (2) 6 B. & C. 403.

*James Baker*, his heirs and assigns, and his freehold land at *Milton* to *James Goldsmith*, his heirs and assigns, continued as follows:—

"I devise to *Richard Henry Baker* and *George John Parson* all my manors, messuages, and hereditaments not hereinbefore devised, both freehold and copyhold, to hold the same unto the said *R. H. Baker* and *G. J. Parson*, their heirs, executors, administrators, and assigns, according to the value and tenure thereof respectively, upon trust, during the life of my son *James Baker*, to receive the rents, issues, and profits thereof, and pay the same unto my son *James Baker* and his assigns, or otherwise to permit him or them to receive the same; and from and after the decease of my said son *James* I give, devise, and bequeath the same to the sole use and behoof of the heirs of his body lawfully begotten. And in case my said son *James* shall die without leaving any issue of his body lawfully begotten, then I give, devise, and bequeath the same unto my daughter *Elizabeth Goldsmith*, her heirs and assigns, for ever." And the testator nominated the said *R. H. Baker*, *G. J. Parson*, and *James Baker*, executors of his will. And the testator declared that the receipt and receipts of his said trustees and executors for any money payable to them by virtue of his said will should effectually discharge any person or persons paying the same from being answerable for the misapplication or non-application thereof.

The testator died in 1844, and by a disentailing assurance dated the 21st of March, 1845, the Plaintiff, the said *James Baker*, granted all the freehold estates comprised in the said residuary devise to *Richard Holmes*, discharged from all estates tail to the use of the Plaintiff in fee.

At a customary court of the manor, of which part of the copyholds devised by the will were holden, the Plaintiff was admitted tenant of the said copyholds (including the copyholds comprised in the agreement for sale referred to in the bill) to hold the same to the Plaintiff and his heirs according to the custom of the manor for such estate as he was entitled to under the will; and at the same court the Plaintiff, for the purpose of barring all estates tail and remainders over, surrendered the same into the hands of the lord to the use of the Plaintiff and his heirs, and the Plaintiff was admitted tenant of the same accordingly.

M. R.
1875
BAKER
v.
WHITE.

By an agreement in writing between the Plaintiff and Defendant dated the 12th of December, 1874, it was agreed that the Plaintiff should sell and the Defendant should purchase the freehold and copyhold hereditaments therein mentioned, which were included in and passed under the said devise, as to the freeholds for an estate in fee simple, and as to the copyholds in fee, according to the custom of the said manor, for the sum of £400.

The Defendant declined to carry out the agreement upon the ground that the Plaintiff was unable to make a good title, inasmuch as he took an equitable life estate only in the said hereditaments.

The bill was filed for a specific performance of the said agreement, and the question raised by the demurrer was, whether, under the will, the Plaintiff took a legal estate tail in the freeholds and copyholds, or either of them, or only an equitable life interest.

Mr. *C. Walker* (Mr. *Chitty*, Q.C., with him), for the Defendant, in support of the demurrer:—

The Plaintiff was only entitled under the will to an equitable estate for life in the freeholds and the copyholds.

The will in question has already been twice the subject of judicial decision, as it came before Lord *Romilly* in the case of *Baker* v. *Parson* (1), where it was contended that, though if it had been a devise of freeholds alone the Plaintiff would have been legal tenant in tail, yet as freeholds and copyholds were included in one devise, and the *Statute of Uses* could not apply to copyholds, the result was that the copyhold estate attracted the legal estate in the freeholds. In support of this argument the case of *Houston* v. *Hughes* (2) was cited, and Lord *Romilly* held that the trustees took a legal estate both in the freeholds and copyholds for the life of the Plaintiff in trust for him, with a legal remainder to the heirs of his body. This will also appears to have been before the Court of Common Pleas as regarded the freehold property in *Doe* v. *Winchester* (3); and a contention there raised, that the legal estate was in the trustees, was overruled on the authority of *Doe* v. *Biggs* (4).

(1) 42 L. J. (Ch.) 228.
(2) 6 B. & C. 403.
(3) 15 L. T. (O.S.) 68.
(4) 2 Taunt. 109.

We contend, however, that the decision of Lord *Romilly* governs this case.

The devise in question is a mixed devise of freeholds and copyholds. In *Cursham* v. *Newland* (1), where there was a devise of freeholds, copyholds, and leaseholds to trustees and their heirs upon trust to the use of the testator's nephews for their lives, with remainders to the use of their children, the trustees were held to take the legal estate in the freeholds as well as in the copyholds.

The way in which a mixed devise has been dealt with is illustrated by the case of *Houston* v. *Hughes* (2), where it was considered that, under a devise of freehold and copyhold lands to *A.* and his heirs in trust for *B.* and his heirs, the circumstance that *A.* took the legal estate in the copyholds was an argument in favour of his taking the legal estate in the freeholds. In *Hawkins* on Wills (3), where *Houston* v. *Hughes* is cited, the principle of construction is stated thus: "If copyhold lands (which are not within the *Statute of Uses*) be devised to *A.* and his heirs in trust for *B.* and his heirs, *A.* takes the legal estate."

In this will it was clearly the intention of the testator to give the legal estate in all the devised lands to the trustees. This appears from the direction that the trustees should receive the rents, issues, and profits, and pay the same to *James Baker* during his life; and from the receipt clause.

Mr. *Fischer*, Q.C., and Mr. *Popham*, for the Plaintiff:—

We submit that the legal estate both in the freeholds and the copyholds devolved upon the Plaintiff. The doctrine of attraction contended for on the other side, on the authority of *Houston* v. *Hughes*, cannot be supported.

The operation of sect. 3 of the *Wills Act* in respect to a devise of copyholds was considered in the case of *Reg.* v. *Garland* (4). There is nothing in the form of the devise or in the purposes of the will which requires the legal estate to be in the trustees. And we contend the vendor can make a good title to all the estate, both freehold and copyhold, and that the demurrer should be overruled.

(1) 2 Bing. N. C. 64.
(2) 6 B. & C. 403.
(3) Page 145.
(4) Law Rep. 5 Q. B. 269.

M. R. 1875 BAKER v. WHITE.

[They referred to *Doe* v. *Nicholls* (1); *Watson* v. *Pearson* (2); *Blagrave* v. *Blagrave* (3).]

Mr. *Walker*, in reply.

[Mr. *Chitty* cited *Stevenson* v. *Mayor of Liverpool* (4).]

SIR G. JESSEL, M.R.:—

I should not have felt either doubt or difficulty about deciding the case were it not for the decision of my predecessor, Lord *Romilly*, in the office I have the honour to hold, in *Baker* v. *Parson* (5), a case on this very will.

In accordance with the practice which I consider to be binding on every Judge of primary jurisdiction, I should have deferred to that authority without argument, had there been no other decision on the subject of this same will by a Court of co-ordinate jurisdiction. But, considering that the decision of the Court of Common Pleas in *Doe* v. *Winchester* (6), and the decision of Lord *Romilly* in *Baker* v. *Parson* on the same will, which I have now before me, cannot by any possibility stand together, I think I am at liberty to say that I am not conclusively bound by the decision in *Baker* v. *Parson*, especially considering that that decision was so recent as the year 1872, and that the decision of the Court of Common Pleas was not cited to Lord *Romilly*. I consider myself, then, free to decide the question as if no decision in *Baker* v. *Parson* had been made; not that I am to disregard it, but that I am entitled, if I think fit, to decide otherwise.

The real questions upon this will are two: First, what estate did the trustees take in the freeholds? and then, what estate did they take in the copyholds? The subject of the contract for sale, of which specific performance is being sought, comprising both freeholds and copyholds, and the demurrer being put in on the ground that a good title cannot be made to the estate, of course if the demurrer is well founded, either as to the freeholds or as to the copyholds, effect must be given to it by allowing it.

(1) 1 B. & C. 336.
(2) 2 Ex. 581.
(3) 4 Ibid. 550.
(4) Law Rep. 10 Q. B. 81.
(5) 42 L. J. (Ch.) 228.
(6) 15 L. T (O.S.) 68.

What, then, is the rule as to freeholds? From the time of Lord *Raymond* it has been settled that a gift to trustees in trust to permit a man to take the rents during his life does not give the legal estate to the trustees without more. It has been treated as analogous to an executed use, not on the ground that the *Statute of Uses* directly applies to wills, because that statute was passed before the *Statute of Devises*, but upon this ground, that the will shewed an intention that the same rules which the *Statute of Uses* made applicable to settlements of real estate should be applied to the gifts or devises by will. It was, therefore, an index of intention and nothing more. On that same principle, when a man gave real estate to the use of *A.* upon trust for *B.*, it was held that *A.* took the legal estate, the language of conveyancers in settlements to which the *Statute of Uses* applies being so used in the will as to amount to an expression of intention that the same mode of construction should be adopted. Beyond that the *Statute of Uses* had no direct bearing.

That being so, the question arose in comparatively modern times upon a gift of this kind: It being admitted that where land is given to a trustee upon trust to pay the rents over to anybody, the trustee must take the legal estate, because otherwise he could not pay at all, as he could not receive the rents, what was to happen where the testator made a gift in this form—"I give to *A. B.* upon trust to pay to or permit *C. D.* to receive the rents"? Of course that was open to two constructions. It might have been said that the power to receive shewed such an intention to vest the legal estate in the trustee that you must give effect to it, or it might have been said that the two directions were contradictory, and that the latter direction in the will contradicted the former, and must be followed. If there never had been a decision fixing the law upon the subject, it is not impossible that I might have thought the former line of argument entitled to the greater weight; but there is an old decision, which has always been recognised as good law—*Doe* v. *Biggs* (1), which has decided that under a will so framed the legal estate passes, not to the trustee, but to the person who takes the life interest. I consider that that is settled beyond

(1) 2 Taunt. 109.

M. R. 1875 BAKER v. WHITE.

question. The case has not only got into the text-books, but has been constantly recognised and acted upon; and it is quite too late to discuss the propriety of the decision.

That being so, I have to consider a gift which, so far as the terms of it are concerned, is exceedingly similar to the case of *Doe* v. *Biggs* (1). The gift here is a gift of the land to the trustees by name, to hold the same unto the trustees by name, their heirs, executors, administrators, and assigns, "upon trust, during the life of my said son *James Baker*, to receive the rents, issues, and profits thereof, and to pay the same unto my said son *James Baker* and his assigns during his life, or otherwise to permit him or them to receive the same." Except that the words are "on trust to receive and pay," instead of "on trust to pay," the case is absolutely undistinguishable from *Doe* v. *Biggs;* but, inasmuch as the *ratio decidendi* in *Doe* v. *Biggs* was that the latter direction in a will being inconsistent with the former must be followed, the trust "to receive and pay" is as much antagonistic, according to that view, to the trust to permit to receive as the trust to pay is antagonistic to the trust to permit to receive; consequently, if *Doe* v. *Biggs* is to be a governing case on the subject, which I take it to be, this case is absolutely undistinguishable from it: and if there is nothing more in the will, it is plain, I take it, on the authority of that case, that the legal estate during the life of *James Baker* is in *James Baker*.

But then it is said that there is a receipt clause. It is true that there is a receipt clause in the will, which declares that the receipts of the trustees and executors shall be good discharges, and it is quite true that the same persons, that is, all the same persons, are not both trustees and executors. It is said that that shews an intention that they shall receive. I think the argument is not without weight. Certainly the clause would be very absurd if the trustees could receive nothing, and if I were to hold that the trustees could receive nothing, I should find great difficulty in saying that I was entitled to disregard that clause; but, inasmuch as I can give effect to that clause without entitling the trustees to receive the rents of the freehold estates, it does not appear to me that the view I take as to the gift of the freeholds is at all incon-

(1) 2 Taunt. 109.

sistent with the receipt clause; and it is the view which was taken by the Court of Common Pleas.

But it was said in the case of *Baker* v. *Parson* (1) that it was not a gift merely of freehold estates—that it was a gift, at least, of copyhold estates also; I say at least, because I do not intend to give any opinion as to whether leasehold estates would or would not pass by this particular gift.

Now, in that case, although Lord *Romilly* stated his opinion to be that the trustees took the legal estate in the freeholds and copyholds for the life of the Plaintiff in trust for him with remainder to the heirs of his body, and although it is possible to suppose he thought that that arose from some other words, yet, inasmuch as I cannot find any reason for it except that addressed to him in argument, I am unable to state why he arrived at that conclusion, unless he adopted the argument. The argument certainly was, that there was what was called an attraction, that the effect of combining freeholds and copyholds in one devise was that the legal estate in the copyholds attracted the legal estate in the freeholds. But why should the legal estate in the copyholds attract the legal estate in the freeholds, in preference to the legal estate in the freeholds attracting the legal estate in the copyholds? If any physical theory of attraction is supposed to govern the decisions of Courts of justice on questions of the limitations of real estate according to English law, I suppose it would be thought that, following physical theories, the weightier and more important body would attract the smaller and less important body, and that, inasmuch as according to English law freeholds are looked upon as being better so far as tenure is concerned than copyholds, it would follow that the freeholds would attract the copyholds. But really there can be no theory of attraction one way or the other.

The case of *Houston* v. *Hughes* (2) was referred to, which was said to warrant that theory of attraction. However, when we come to look at that case we find that it was a case in which, as I understand it, there were excellent reasons for giving a legal fee to the trustees. The gift itself was contained in a will; which was sent for the opinion of the Court of Common Law by the

(1) 42 L. J. (Ch.) 228.

(2) 6 B. & C. 403.

M. R. 1875 BAKER v. WHITE.

Court of Chancery, as was the practice in those days. It began by a direction that his (the testator's) just debts, funeral and testamentary expenses, and the expenses of proving his said will, should be fully paid and satisfied; followed by a devise to trustees of all his property, freeholds, copyholds, or leaseholds. According to my notion of the law as it then stood and as it still stands, that would have charged the debts on the real estate, and you did not want any more (there being a devise to the trustees and their heirs) to give them the fee. There were other reasons for giving them the fee also. Mr. Justice *Bayley* says this (1): "Upon the question whether the trustees take the legal fee or not I think that according to the case of *Doe* v. *Willan* (2), where an estate is given to trustees and their heirs indefinitely, the trustees will take the fee if the purposes of the trust require that they should have the absolute property in them, or that they should take it for an indefinite period of time unless a contrary intent is manifested on the face of the will."—I take it the law is now settled in wider terms than that—that now they take the fee unless you can shew on the other side that the estate is distinctly limited, that is to say, the *onus probandi* is the other way—"Now, in this case, the freehold property being mixed with property in which the trustees must have the whole interest, is a circumstance which may assist the Court in determining whether the trustees take the whole fee or less than the fee"—I cannot understand that statement. Was it ever said that under the old law that gave them a fee without words of limitation?—"In this instance they must take an absolute interest both in the copyholds and in the leaseholds for years; and if they do not take an absolute interest in the freeholds of inheritance and the freeholds for life, the consequence would be that the one would be separated entirely from the other, which would be directly contrary to the intention of the testator." But the learned Judge does not seem to have noticed that if they remained together so long as the trusts of the will required it, there was no reason why they should not separate afterwards; and that was the whole question. It appears to me that the case is not an authority for the principle of attraction, and that the ground I have stated

(1) 6 B. & C. 421. (2) 2 B. & A. 84.

would have been sufficient to support the decision, although it could perhaps have been well supported on other grounds.

That is the only authority. But is there any doubt or question that you can give freeholds, copyholds, and leaseholds together, and that the persons who take them need not take the same estate in all? I cannot understand why there should be any doubt on the subject, or why there should be any notion that they must perforce take the same estate.

Now I come to treat of the gift of copyholds. The gift of copyholds standing alone seems to me to be quite as free from difficulty as the gift of freeholds standing alone. I pass from the consideration of their going together. I say that it ought not, in my opinion, to affect the construction. The gift of copyholds to *A.* upon trust for *B.* gives a legal estate in the copyholds to *A.*, and the reason of it is this, that you have no aid from the analogy of the *Statute of Uses;* the testator cannot intend to tell you it is to be settled according to the *Statute of Uses*, because the *Statute of Uses* never did apply to copyholds. So that you lose the reason for construing this will with reference to the *Statute of Uses.*

If that is so, the next question arises: Is there any way of limiting the estate? Is a gift to *A.* and his heirs of copyholds upon trust for *B.* for life, and after the death of *B.* upon trust for *C.* in fee, one which of necessity carries a fee simple, if I may so call it—it is not a fee simple, but an absolute interest in the copyholds—to the trustee? Now that is a question which has been argued and decided more than once. First, what is the law respecting copyholds? The law with respect to freeholds is clear, that you do not, under an indefinite gift to trustees with a definite period for the existence of the trust, assume that a larger legal estate was intended to pass to the trustees than was necessary for the performance of the trust during that definite period. That has frequently been laid down by the Courts. I will read what was said in *Watson* v. *Pearson* (1): "It is certainly true that where the purposes of the trust upon which the estate is devised to trustees are such as not to require a fee in them, as, for instance, where the trust is to pay annuities, or to pay over rents and profits to a party for life, there, if subject to the specified trusts the estate is given

(1) 2 Ex. 593.

M. R. 1875 BAKER v. WHITE.

over, the parties taking under such devise over have been held to take legal estates: the estate given to the trustees (even when given with words of inheritance) having been in such cases taken to have been meant to be co-extensive only with the trust to be performed." Now there one of the two illustrations given is a gift to one for life as being an instance of a simple definite trust with a gift over.

I may say that that doctrine is expressly recognised and affirmed in Baron *Parke's* judgment in the case of *Blagrave* v. *Blagrave* (1). So that, in a simple gift of freeholds to *A.* and his heirs upon trust to pay the rents to *B.* for life, with a gift over on the death of *B.* in remainder simply to *C.* and his heirs, *C.* takes the legal estate after the death of *B.* That I take to be clear and settled law. But this also has been decided: that if, instead of a simple remainder, the testator begins again and gives the property in this way, 'I give *Blackacre* to *A.* and *B.* and their heirs, upon trust to pay the rents to *C.* for life, and after the decease of *C.* I give and devise *Blackacre* to *D.*;' there, it being what is called a new devise, it has been held to be equally clear—it cannot be more clear or better established—that the devisee takes the legal estate; it being the beginning of a new devise, the estate of the trustees, although not in terms limited to the life of the first beneficial owner, is read as if it were so limited.

4 Ch D. 460

That is the law as to freehold estates. Then what is the law as to leasehold estates? Upon that a modern case, no doubt, but a very good authority, *Stevenson* v. *Mayor of Liverpool* (2) has been cited. There there was a gift in this way: a gift which the Court held to be a gift for life to a lady, and that the executors during her life took the legal estate, the gift being indefinite. It was given in this wise: "Subject to my debts, I bequeath to my wife the clear rentals of my two (leasehold) houses for her life, to be paid to her every month, and after her decease I leave (one of them) to my son *R.*; and I direct that the rents shall be received and the property be under the management of my executors. After *R.*'s decease" (that is, the son), "I direct his share of the property be equally divided between his children; but, should he die without leaving lawful issue, I direct the

(1) 4 Ex. 550. (2) Law Rep. 10 Q. B. 81.

same to be equally divided among the surviving children of my daughter." Then he appointed executors, and the executors proved the will. It was held, that although there was no direct bequest, the executors took the legal estate in the house as trustees, but only to the extent of the trust, and that after the death of *R.* the legal estate became vested in the surviving children, that is, it was held that the extent of the trust was marked out by a definite limited interest, and that the moment there was absolute interest, the same as in freeholds, trustees were not wanted any longer, because the absolute owners might fairly take care of their own property. Consequently, I take it the law as to leaseholds is exactly the same as to freeholds.

Now, what is the law as to copyholds? On that point there is a most distinct authority, if any authority is wanted. In *Doe* v. *Barthrop* (1) the point occurred. In that case there was a gift of copyholds to trustees and their heirs in trust to permit a lady, who was not married, though that is not material, to receive the rents or to pay the same to her during her life, and they were to be free from the debts of the husband, if she should marry, and after her death in such manner as she should appoint, and in default of appointment to her right heirs. The question was, whether, after the death of the testatrix, she having used the second class of words, "I devise the premises unto such person," the appointee under the lady's will took the legal estate in the copyholds. The Judges decided that the appointee did take the legal estate, for the reason that there had been a gift to trustees and their heirs indefinite in terms, not required for any purpose after the life of the lady, because she could then appoint absolutely or her heirs would take, and there was no necessity for the continuance of the trust after her death. The terms of the trust were indefinite to them and their heirs, but it was held that the trust was confined by the words "during her life." It is exactly the same rule in principle both as regards freehold and leasehold estates. So that, as regards the three descriptions of estates, where there is an indefinite devise to trustees and their heirs upon trust to pay or allow somebody to receive the rents during life, followed either by a simple remainder to another

(1) 5 Taunt. 382.

M. R. 1875 BAKER v. WHITE.

person in fee simple, or in fee tail, or as another person shall appoint, but giving an absolute interest; or followed by a new devise to a person in fee simple or fee tail, or giving an absolute interest, —in either of those cases the estate of the trustees by implication is to be limited to the life of the person who takes the first life interest.

Now, applying that to this case, we find the exact case so far in *Doe* v. *Barthrop* (1)—taking away the separate use, which is immaterial, for the rule is the same whether the tenant for life is a man or a woman—here we find the estate is to be held during the life of the son by the trustees who are to pay or permit him to receive the rents, which, being a copyhold, must give them the legal estate at all events—"and from and after the decease of my said son *James*, I give and bequeath the same" (a new devise) "to the sole use and behoof of the heirs of his body lawfully begotten," which is a fee tail. The result, therefore, is, that according to what I understand to be the settled law on the subject, there is an estate in the trustees and their heirs during the life of the son in the copyholds, and after his death the legal estate to the use of the heirs of his body; and if that be so, I can give full effect to the receipt clause, because the trustees will receive the rents of the copyholds during the life of the son, and there is no occasion to reject it or to say that it has no bearing on the construction.

For these reasons, I am of opinion that the Plaintiff can make a good title to the freehold estates, but that he cannot make a good title to the copyhold estates, and therefore I allow the demurrer.

Solicitors for the Plaintiff: Messrs. *Newman & Lyon.*
Solicitors for the Defendant: Messrs. *Tidy, Herbert, & Tidy.*

(1) 5 Taunt. 382.

## *In re* COWARD AND ADAM'S PURCHASE.

M. R.
1875
April 29.

[1875 C. 59.]

*Husband and Wife—Legacy to Wife not reduced into Possession—Desertion—Protection Order—20 & 21 Vict. c. 85, ss. 21, 25—Vendor and Purchaser Act*, 1874 (37 & 38 Vict. c. 78), s. 9—*Costs.*

Where a married woman, entitled to a legacy charged on real estate which had not been reduced into possession by her husband, obtained a protection order, in consequence of her husband's desertion, under 20 & 21 Vict. c. 85, s. 21:—

*Held*, that the legacy, on being paid to her after the date of the order, was property which then came to or devolved upon her within sects. 21 and 25 of the Act, and that her receipt was a good discharge:

*Held*, also (the question being raised by summons under the *Vendor and Purchaser Act*, 1874, s. 9, in respect to the title to the estate charged), that the declaration ought to be made without costs.

Form of order.

THIS was an application under the *Vendor and Purchaser Act*, 1874 (37 & 38 Vict. c. 78), s. 9. The vendor, *Thomas Coward*, was entitled under a devise to a copyhold estate charged with a legacy of £400 to the testator's daughter, the wife of *James Leggett*. The legacy was not reduced into possession by *Leggett*, but was retained by *Coward* till after the 10th of March, 1874, when Mrs. *Leggett*, having been deserted by her husband, obtained a protection order under 20 & 21 Vict. c. 85, s. 21, whereupon *Coward* paid the legacy to Mrs. *Leggett* on her receipt.

*Coward* had contracted with *J. R. Adams* for the sale to him of the said devised estate, and the abstract having been delivered, a requisition was made by the intending purchaser as to the proper discharge of the estate from the payment of the legacy.

The summons was taken out by the vendor in respect of the purchaser's requisition, and the question was whether Mrs. *Leggett's* receipt was a valid discharge so as to give a good title to the purchaser.

Mr. *Rigby*, for the vendor:—

The receipt given by Mrs. *Leggett* was a sufficient discharge for the legacy charged on the devised estate. This legacy had

M. R. 1875 *In re* COWARD AND ADAM'S PURCHASE.

not been reduced into possession by the husband, nor paid to him. I submit, therefore, that after she had obtained the protection order, it was property that came to or devolved upon her within the meaning of the Act 20 & 21 Vict. c. 85.

By sect. 21 of the Act a wife deserted by her husband may apply to a magistrate for an order "to protect any property she may become possessed of after such desertion," and it is provided that she shall be in the like position with regard to property as she would be under that Act if she had obtained a decree of judicial separation. By sect. 25 it is provided that in the case of judicial separation she shall, "whilst the separation shall continue, be considered as a *feme sole* with respect to any property which she may acquire or which may come to or devolve upon her."

The case of *In re Insole* (1) was somewhat similar to the present. There a married woman entitled to a reversionary interest in personalty had joined with her husband in mortgaging such interest, and afterwards obtained a decree of judicial separation, and while she was living apart from her husband the property came into possession. It was held that she was entitled to it absolutely under sect. 25 of the Act before mentioned, and under 21 & 22 Vict. c. 108, s. 8.

So in *Johnson* v. *Lander* (2), where a wife had instituted a suit to enforce her equity to a settlement of a trust fund, and while the suit was pending obtained a decree of judicial separation from her husband: there the Court ordered the fund to be paid to her.

This being so in the case of judicial separation, it is even more clear in the case of a protection order which extends to "any property she may become possessed of." In the present case, therefore, the wife's receipt for the legacy will be a sufficient protection to the purchaser.

Mr. *C. Browne*, for the purchaser, submitted that it was too doubtful whether the wife's receipt is a sufficient discharge for the title to be accepted by the purchaser.

SIR G. JESSEL, M.R.:—

The simple question in this case is, whether a wife who has

(1) Law Rep. 1 Eq. 470. (2) Law Rep. 7 Eq. 228.

obtained a protection order under sect. 21 of the Act 20 & 21 Vict. c. 85, can give a good receipt for a legacy payable to her while a married woman. The legacy was presently payable, but was not exigible either by the husband or wife during their joint lives. The wife could only obtain it by filing a bill by her next friend; the husband could not receive it unless the owner of the estate on which it was charged chose to pay it to him; in no case could either obtain payment of it without such owner's consent. There was, therefore, no absolute right to the legacy in either husband or wife before the desertion.

The protection order, by sect. 21 of the Act, places the wife "in the like position in all respects with regard to property as she would be if she had obtained a decree of judicial separation," in which case it is provided by sect. 25 that "she shall, whilst the separation shall continue, be considered as a *feme sole* with respect to property of every description which she may acquire, or which may come to or devolve upon her."

Here the person liable to pay the legacy goes to the wife after the protection order and offers to pay it. He might have paid it to the husband, but having thus come to the wife and offered to pay it to her it comes to her within the meaning of the section, and that which never was hers before becomes hers when she is to be considered with respect to it as if she were a *feme sole*. Both on the words of the section and in the true meaning of the transaction, this is property which she acquires after the date of the protection order. A similar point was decided in *Johnson* v. *Lander* (1); but if there were no other decision, I should be of opinion that she could give a good discharge for her legacy.

7 Ch. D 54

The 9th section of the Act of 1874 gives to the Court a discretion as to costs, but I do not consider it is a case in which the unsuccessful party to the application should pay all the costs.

The proper form of order will be, that the Court being of opinion that Mrs. *Leggett* was by virtue of a protection order empowered to give a valid receipt for the legacy, it is declared that the requisition of the purchaser is satisfied.

Solicitors: Messrs. *Cole, Cole, & Jackson;* Mr. *J. R. Adams.*

(1) Law Rep. 7 Eq. 228.

M. R.
1875
May 31.

## BASNETT *v.* MOXON.

[1872 B. 66.]

*Partition Suit — Decree for Sale — Limitation to Heirs of Living Person — "Unborn Person" — Partition Act*, 1868 (31 & 32 *Vict. c.* 40), *s.* 7 — *Trustee Act*, 1850 (13 & 14 *Vict. c.* 60), *s.* 30.

Under a will an undivided share of real estate stood limited in remainder after certain life estates and estates tail to the right heirs of *A.* In a partition suit to which *A.* was a party, a decree for sale was made under the *Partition Act*, 1868 :—

*Held*, that the interests of the persons or person who on the death of *A.* would become the right heirs or right heir of *A.* were bound in equity by the decree :—

*Held*, also, that such persons were "unborn" persons within the meaning of the *Trustee Act*, 1850, s. 30.

THIS was a suit for partition or sale under the *Partition Act*, 1868, of certain real estate. A decree for sale had been made, and the property had been sold thereunder.

By the will of *William Basnett*, dated the 14th of April, 1834, the property in question was devised to *Daniel Basnett*, *Samuel Basnett*, and *James Basnett*, in equal undivided shares, during their respective lives, with remainder as to one moiety to *James William Basnett* (son of *James Basnett* for life), with remainder to the first and other sons of *James William Basnett* successively in tail, with remainder to the daughters of *James William Basnett* as tenants in common in tail, with an ultimate remainder to the right heirs of *James Basnett;* and as to the other moiety in manner therein mentioned.

The testator died in August, 1835.

*James Basnett* and *James William Basnett* were both living; the latter was a bachelor.

At the death of the testator the estate was subject to a mortgage, which was afterwards paid off; and upon such payment being made the mortgagee re-conveyed the estate to *Thomas Heaton* (a Defendant to this suit), his heirs and assigns, to the uses of the testator's will.

A summons was taken out by one of the purchasers under the

decree asking, amongst other things, that it might be declared that the interests of the person or persons who upon the death of *James Basnett* would be and become his right heir or right heirs were interests of persons who upon coming into existence would be trustees within the meaning of the *Trustee Act*, 1850.

This summons was adjourned into Court, and now came on to be heard.

Mr. *Chitty*, Q.C., and Mr. *Whitehead*, for the summons:—

*James Basnett* is entitled to one-third of the estate for life, and there is an ultimate remainder as to one-half to his own right heirs. Consequently he has, under the rule in *Shelley's Case*, an ultimate remainder in fee in one-third of the estate; but his right heirs will take an estate in fee in one-sixth of the estate (being the difference between one-half and one-third), as purchasers. The question is whether the interests of the right heirs of *James Basnett* in this one-sixth are bound in equity by the decree, and if so, whether the Court can declare such interests to be the interests of persons who upon coming into existence would be trustees within the meaning of the *Trustee Act*, 1850, s. 30.

First: It is established by numerous authorities, of which *Gaskell* v. *Gaskell* (1) is one, that the interests of persons who are not in existence or unascertained are bound by a decree for partition. Under the *Partition Act*, 1868, the Court may make a decree for sale in all cases where it can make a decree for partition. Consequently the interests of the right heirs of *James Basnett* are bound by the decree.

Secondly: The right heirs of *James Basnett* are "unborn persons" within the meaning of the *Trustee Act*, 1850, s. 30, which (by sect. 7 of the *Partition Act*, 1868), applies to sales in partition suits. It was clearly the object of the Legislature to enable the Court to deal with the legal estates of all persons bound by the decree. The words "unborn person" are used in the *Trustee Act* in the sense of "person not in existence:" see sect. 16 of the *Trustee Act*. A like interpretation has been placed upon similar words in the *Leases and Sales of Settled Estates Act*, 1856: *Beioley* v. *Carter* (2).

(1) 6 Sim. 643. (2) Law Rep. 4 Ch. 230.

M. R. 1875 BASNETT v. MOXON.

Mr. *Badnall* (Mr. *Southgate*, Q.C., with him), suggested that at present the legal estate was in *Thomas Heaton*, who might be ordered by the Court to convey it, so as to defeat the title of the heirs of *James Basnett*.

Mr. *Ince*, for the Defendants.

SIR G. JESSEL, M.R.:—

I am of opinion that it is only fair to construe the 30th section of the *Trustee Act*, 1850, in such a manner as to provide for the case which I have to deal with here. First of all, independently of that section, it is quite plain, and settled by authority, that wherever the Court has jurisdiction to make a decree for sale the decree for sale binds in equity the interests of all persons not in existence, and who cannot be made parties to the suit, whether they are not in existence because they are not actually living (and of course cannot be made parties), or not in existence because it is uncertain who may become entitled, and that even although it may be certain that some living person will ultimately become entitled. In all those cases the decree of the Court is never allowed to be interfered with by any of the persons afterwards coming into existence, either by being born or by acquiring the character entitling them to an interest. If any other rule were adopted, the arm of the Court would be paralysed. Therefore, if this *Trustee Act* of 1850 had never been passed, and the *Partition Act* only had been passed, yet when it is conceded that you have before the Court every living person who could be properly made a party, the decree for sale is a good decree, and binds the interest of everybody else, whether unborn or already born (in the sense of living), but not sustaining the character of the person taking the property. In all such cases the decree binds the equity.

The next question is, does it bind the legal estate, or have I the power to bind the legal estate? Now what was the object of the Legislature in passing the 7th section of the *Partition Act*, 1868? The object could not have been to bind the equities, because they were bound already; the only object was to transfer the legal estate. Then the real question to be decided is whether the word "unborn," as used in the 30th section of the *Trustee Act*, 1850,

means "non-existent"—that is, non-existent in the character to entitle a person to the property in question. I think that is the proper reading of the term. The object was to enable the Court to convey a future legal estate devolving upon a person who could not be made a party to the suit. In a sense, the right heirs of a living person are unborn persons. In a sense, the future heir-at-law of a living person, although he may be a living man, is not a living heir. As heir—that is to say strictly in the character of heir—he comes into existence at a future period. Again, the word "person" does not necessarily mean a man at all. It applies by the interpretation clause to a corporation. I think the word "unborn" may be interpreted fairly and properly, looking at the intention and fair spirit of the Act, to mean any person so far not in existence as that he could not be properly made a party to the suit, and the latter words of the section help that view. The section enables the Court to make such order as it "might under the provisions of this Act make concerning the estates, rights, and interests of trustees born or unborn." In strictness, there is no such thing as an "unborn trustee;" it is not easy to put a meaning on the words, but whatever may be meant, I think it is clear that the word "unborn" is not here used in the popular sense. Seeing, then, that the word is used in the later part of the section not in the popular sense, I think I am warranted in saying that the case comes within the Act; and it will be unnecessary to revert to the curious learning which has been referred to, as to the estate of a grantee to uses and so forth.

There will be a declaration according to the terms of the summons, and it will be well also to declare that all the parties to the suit are trustees, so as to bind the legal estate in that way also.

Solicitors: Messrs. *T. White & Sons;* Mr. *H. Tyrrell;* Mr. *E. Doyle.*

M. R.

1875

May 4.

## *In re* MACLEAY.

[1875 M. 75.]

*Will—Restraint on Alienation—Devise on Condition never to sell out of Family —Vendor and Purchaser—Title*—25 & 26 *Vict. c.* 53, *s.* 6.

6 PC 384
6 LD 321
1 Jaff Cas 55

Devise "to my brother *J.* on the condition that he never sells out of the family," followed by gifts to other relatives:—

*Held*, that the condition was valid:

*Held*, also (on an application under 25 & 26 Vict. c. 53, s. 6), that *J.* could not give a marketable title to a purchaser who was a stranger to the family.

*Attwater* v. *Attwater* (1) distinguished.

THIS was a summons taken out by an intending purchaser for the opinion of the Court on a question as to the vendor's title under the *Transfer of Land Act* (25 & 26 Vict. c. 53), s. 6.

*Margarette Mayers*, by her will, after a gift to her brother *Henry* on condition that he settled it on his wife and children, and the gift of a like sum to his sisters, made the following devise:—

"I give to my dear brother *John* the whole of the property given to me by my dear aunt *Clara Perkins*, consisting of the manor of *Bletchingley*, in the county of *Surrey*, and the *Pendell Court Mansion*, with the land belonging to it, on the condition that he never sells it out of the family."

The testatrix then gave legacies to her nephews and nieces named in the will, and after a legacy to a servant, gave the residue of her estate and effects to her "dear brothers" and "dear sisters."

*John Perkins Mayers*, the devisee under the will, contracted with Sir *George Macleay* for the sale to him of the property comprised in the devise, with a proviso that the intending purchaser should be at liberty to apply for registration of the hereditaments in the Office of Land Registry, and that in the event of its being found impossible to obtain such registration, the contract should be void.

(1) 18 Beav. 330. 18 Jur 50

In the course of the investigation of the title a doubt arose whether a marketable title could be made to the property, having regard to the condition annexed to the devise to the vendor "that he never sells it out of the family;" and the following question was submitted to the Court by the Registrar under sect. 6 of the *Transfer of Land Act*: "Whether, having regard to the sale by the vendor, the title is such as a Court of Equity would hold to be a valid marketable title within the meaning of the 5th section of the Act."

Mr. *Fischer*, Q.C., and Mr. *Nalder*, for Sir *G. Macleay*, submitted the question of the validity of the condition to the judgment of the Court.

They cited Co. Litt. (1); *Attwater* v. *Attwater* (2); *Ware* v. *Cann* (3); *Churchill* v. *Marks* (4); *Gravenor* v. *Watkins* (5); *Blackwell* v. *Bull* (6).

SIR G. JESSEL, M.R.:—

The question I have to decide is, whether a condition in a will containing these terms is valid in law:—"I give to my dear brother *John* the whole of the property given to me by my late dear aunt *Clara Perkins*, consisting of the manor of *Bletchingley*, in the county of *Surrey*, and the *Pendell Court Mansion*, with the land belonging to it, on the condition that he never sells it out of the family." Then the testatrix gives certain property to nephews and nieces, naming them, and other property to her "dear brothers" and "dear sisters," who are evidently treated by her as members of her family. I have no doubt the family in question means her blood relations. Looking at the will, I have no doubt that there is a condition annexed to the gift in fee, and that, under the word "property," the vendor will get the fee of the freehold manor in question, and mansion-house and lands, on the condition that he never sells it away from his blood relations.

First of all, it is to be observed that the condition, good or bad, is confined within legal limits; it is applicable merely to the

(1) Page 223 a.
(2) 18 Beav. 330.
(3) 10 B. & C. 433.
(4) 1 Coll. 441.
(5) Law Rep. 6 C. P. 500.
(6) 1 Keen, 176.

M. R. 1875 *In re* MACLEAY.

devisee himself, and therefore is not void on any ground of remoteness. It has been suggested, however, that it is void as being repugnant to the quality of the estate, that is to say, that you cannot restrict the right of an owner in fee of alienating in any way in which he may think fit. If that were the law, the condition would be plainly void. But, with the exception of one authority, a case decided by my immediate predecessor, I am not aware that the law has ever been laid down in that way.

The law on the subject is very old, and I do not think it can be better stated than it is in *Coke* upon *Littleton*, in *Sheppard's* Touchstone, and other books of that kind, which treat it in the same way. *Littleton* says (1): "If a feoffment be made upon this condition, that the feoffee shall not alien the land to any, this condition is void, because when a man is enfeoffed of lands or tenements he hath power to alien them to any person by the law. For if such a condition should be good, then the condition should oust him of all the power which the law gives him, which should be against reason, and therefore such a condition is void." Then he says (2): "But if the condition be such that the feoffee shall not alien to such a one, naming his name, or to any of his heirs or of the issues of such a one, or the like, which conditions do not take away all power of alienation from the feoffee, then such condition is good." So that, according to *Littleton*, the test is, does it take away all power of alienation? I think it is fair to make one remark, which is made in the case of *Muschamp* v. *Bluet* (3), cited in *Jarman* on Wills (4), and adopted by Lord *Romilly* in the case I am going to refer to, of *Attwater* v. *Attwater* (5)—that it must not, in fact, take away all power, because, if you say that he shall not alien except to *A. B.*, who you know will not or cannot purchase, that would be in effect restraining him from all alienation, and, as is very well said in many cases, and is said in a passage in *Coke* to which I am about to refer, you cannot do that indirectly which you can do directly. I had occasion to refer, in the case of *Jacobs* v. *Brett* (6), to a practice which was said to prevail in the Court of Common Pleas, and where I said it never could have been

(1) Page 222 a.
(2) Page 223 a.
(3) Bridgm. 137.
(4) 3rd Ed. vol. ii. p. 17.
(5) 18 Beav. 330.
(6) *Ante*, pp. 1, 9.

considered by that Court as being intended as the infringement of so salutary a rule. The condition, therefore, whatever it may be must not really take away all power, either by express words or by the indirect effect of the frame of the condition. That is the effect of the rule as laid down by *Littleton*. Then *Coke* says (1): "If a feoffment in fee be made upon condition that the feoffee shall not infeoff *J. S.* or any of his heirs, or issues, &c., this is good, for he doth not restrain the feoffee of all his power: the reason here yielded by our author is worthy of observation. And in this case, if the feoffee infeoff *J. N.* of intent and purpose that he shall infeoff *J. S.*, some hold that this is a breach of the condition, for *quando aliquid prohibetur fieri, ex directo prohibetur et per obliquum.*" That was *Coke's* notion; and I hope it has not altogether departed from our Courts. Then he says: "If a feoffment be made upon condition that the feoffee shall not alien in mortmain, this is good, because such alienation is prohibited by law, and regularly whatsoever is prohibited by the law may be prohibited by condition, be it *malum prohibitum* or *malum in se*," and there he stops.

So that, according to the old books, *Sheppard's* Touchstone being to the same effect, the test is whether the condition takes away the whole power of alienation substantially: it is a question of substance, and not of mere form.

Now, you may restrict alienation in many ways. You may restrict alienation by prohibiting a particular class of alienation, or you may restrict alienation by prohibiting it to a particular class of individuals, or you may restrict alienation by restricting it to a particular time. In all those ways you may limit it, and it appears to me that in two ways, at all events, this condition is limited. First, it is limited as to the mode of alienation, because the only prohibition is against selling. There are various modes of alienation besides sale; a person may lease, or he may mortgage, or he may settle; therefore it is a mere limited restriction on alienation in that way. Then, again, it is limited as regards class; he is never to sell it out of the family, but he may sell it to any one member of the family. It is not, therefore, limited in the sense of there being only one person to buy; the will shews

(1) Page 223 b.

M. R. 1875 *In re* MACLEAY.

there were a great many members of the family when she made her will; a great many are named in it; therefore you have a class which probably was large, and was certainly not small. Then it is not, strictly speaking, limited as to time, except in this way, that it is limited to the life of the first tenant in tail; of course, if unlimited as to time, it would be void for remoteness under another rule. So that this is strictly a limited restraint on alienation, and unless *Coke* upon *Littleton* has been overruled or is not good law, this is a good condition.

It is said that the very point occurred in *Doe* v. *Pearson* (1) and *Attwater* v. *Attwater* (2), and it appears to me that the point did occur in both those cases. In *Doe* v. *Pearson* the gift was a gift in fee upon this special proviso and condition, "that in case my said daughters *Ann* and *Hannah Collett*, or either of them, shall have no lawful issue, that then and in such case, they and she having no lawful issue as aforesaid shall have no power to dispose of her share in the said estates so above given to them, except to her sister or sisters, or to their children." Now, it is to be observed that the number of alienees possible in that case was smaller than the number in this case: there it was limited to "her sister or sisters, or their children." Here it is "family," which is a larger term. In the next place, here it is "sell" only, there it was "dispose," which is probably the largest term known to the law. So that the power of alienation was very much more restricted in *Doe* v. *Pearson* than it is in the case before me. But the full Court there held, after a very long and elaborate argument, Lord *Ellenborough* giving judgment and going into the authorities very carefully, that the condition was good; and he says (3): "As to the first, we think the condition is good; for, according to the case of *Daniel* v. *Ubley* (4), though the Judges did not agree as to the effect of a devise," and so forth, "yet in that case it was not doubted but that she might have had given her a fee simple conditional to convey it to any of the sons of the devisor; and if she did not, that the heir might enter for the condition broken." Now that is a stronger case still; because, as Lord *Ellenborough* and the other Judges of the Queen's Bench read

(1) 6 East, 173.
(2) 18 Beav. 330.
(3) 6 East, 180.
(4) Sir W. Jones, 137; Latch, 9, 39, 134.

*Daniel* v. *Ubley* (1), all the Judges agreed, in the time of Sir *W. Jones*, that it was good to give a woman a fee simple with a condition to convey it to one of the sons of the devisor; that is, she could not convey it to anybody else; it was limited. There Mr. Justice *Doderidge* said (2) "He conceived she had the fee, with condition, that if she did alien, that then she should alien to one of the children," which is a very limited class; and he finally concluded by saying that "her estate was a fee with a liberty to alienate it if she would, but with a condition that if she did alienate, then she should alienate to one of her sons." So that the case of *Daniel* v. *Ubley* is also stronger than the present. In the first place, it was a prohibition, not merely against selling, but against all alienation; and in the next place, the class was limited to one of the sons of the devisor; but yet the Judges gave an opinion that it would be good, and following that old authority, Lord *Ellenborough* and the Judges of the Queen's Bench, in *Doe* v. *Pearson* (3), in the year 1805, held that the condition was valid.

That being the state of the law, the matter came before my predecessor, in *Attwater* v. *Attwater* (4), in the year 1853, which I need not say is rather a modern time to alter the law of real property. The words there were: "Item, I bequeath to *G. T. Attwater*, junior, eldest son of my niece, the family estate at *Charlton, Wiltshire*, to become his property on attaining the age of twenty-five years, with an injunction never to sell it out of the family; but if sold at all, it must be to one of his brothers hereafter named." There, therefore, was something more than not selling it out of the family. The "family" was restricted by the following words: "to one of his brothers." There was a definition given of the family there — it meant his brothers; but if those words were held to mean a condition, upon which I will say a word presently, then one would have thought the rule of *Doe* v. *Pearson* would apply. I cannot see that there is much distinction between "sister or sisters and their children" and "brother or brothers;" and more particularly, bearing in mind

(1) Sir W. Jones, 137; Latch, 9, 39, 134.
(2) Latch, 41.
(3) 6 East, 173.
(4) 18 Beav. 330. 18 Jan 50

M. R. 1875 *In re* MACLEAY.

that here it was only to "sell" and there it was to "dispose." The case of *Doe* v. *Pearson* (1) and a great many others were cited, and the Master of the Rolls gave a judgment in these words (2): "The next question which arises on this devise is, whether the restraint on alienation be valid or not. It is plain, in the first place, that the true construction of this clause cannot be to give a right of pre-emption to the brothers of *G. T. Attwater*, and that if they do not purchase, the devisee may claim whensoever he pleases. The meaning is, I think, plain, that the testator intended to impose this fetter, that if the brother will not buy, the devisee was not to be at liberty to sell the property to any one." (The words are "to one of his brothers"). "The question is whether such a condition is a valid one? Notwithstanding the case of *Doe* v. *Pearson*, this appears to me to be a condition repugnant to the quality of the estate given." He does not attempt to say that *Doe* v. *Pearson* is not law, but he says, notwithstanding it. Therefore, as I consider, he means to distinguish it. "It is obvious, that if the introduction of one person's name, as the only person to whom the property may be sold, renders such a proviso valid, a restraint on alienation may be created, as complete and perfect as if no person whatever was named; inasmuch as the name of a person who alone is permitted to purchase might be so selected, as to render it reasonably certain that he would not buy the property, and that the property could not be aliened at all." If that were so, I should altogether agree with that part of the judgment. Then he goes on: "It appears to me, also, that this is the true construction of the words used by the testator; it is, in truth, an injunction never to sell the hereditaments devised at all. The words 'out of the family' are merely descriptive of the effect of the sale, and not of the person to whom it might be sold, as is shewn by the two last clauses of a similar character, relating to the devises to *William* and *Edward Attwater*, which, in referring to this clause, state that the property is not to be sold out of the family, as before specified. It is not, in my opinion, desirable to impose fresh fetters on the enjoyment of property; and it appears to me that this proviso is distinctly at variance with the rules laid

(1) 6 East, 173.

(2) 18 Beav. 336. 18 Eq 51

down by Lord *Coke* (1), and which have always been considered and treated as good law. I am of opinion, therefore, that this clause is merely inoperative."

Now, taking that altogether, seeing that he has no quarrel with *Doe* v. *Pearson* (2), seeing that he takes it that *Coke's* assertion is good law, the key to that judgment must be found in the latter observations, where he says: "It appears to me, also, that this is the true construction of the words used by the testator; it is, in truth, an injunction never to sell the hereditaments devised at all. The words 'out of the family' are merely descriptive of the effect of the sale;" and, so read, it does not conflict with the older authorities to which I have had occasion to refer. I must consider that case, recognising, as it does, those older authorities as being good law, to have proceeded on the particular wording of that will, and more especially on the latter clause. I do not say that the clause does have the same effect on my mind that it had upon the mind of my predecessor; but still it is useless to criticise a question of construction when you come to the conclusion that the Judge is intending not to lay down a new rule of law, but is simply construing the particular instrument before him.

Therefore I consider that the case of *Attwater* v. *Attwater* (3) does not affect the law of the case, and that this being a limited restriction upon alienation, the condition is good.

Solicitors: Messrs. *W. & J. Flower & Nussey.*

(1) Co. Litt. 223 a. (2) 6 East, 173.
(3) 18 Beav. 330. 18 Z, 50

M. R.
1875
May 3.

## TUFNELL *v.* BORRELL.

[1872 T. 139.]

*Estate Tail—Disentailing Assurance—Protector of Settlement—Two or more Owners of prior Estate—Undivided Shares—Fines and Recoveries Act* (3 & 4 *Will.* 4, *c.* 74), *s.* 23.

Freeholds stood limited to *A.*, *B.*, *C.*, and *D.* jointly for life, remainder in fifths to them and *E.* as tenants in common in tail male, with cross remainders in tail male.

*A.*, without the consent of *B.*, *C.*, or *D.*, and in the lifetime of *E.*, who afterwards died without issue, executed a disentailing deed of his estates tail:—

*Held*, that *A.* was protector not merely of an aliquot share of the estate, but specifically of his original fifth share, and also of the fourth of *E.*'s fifth in remainder after *E.*'s estate tail; and consequently that the original fifth share of *A.*, and also his fourth of *E.*'s fifth share, were effectually disentailed.

THIS was the further consideration of a suit instituted for partition or sale of certain real estates under the *Partition Act*, 1868. An order for sale had been made, the sale had been carried into effect, and it was now proposed to distribute the purchase-money among the parties entitled.

*R. Tufnell*, by his will, dated the 12th of April, 1794, devised the property in question, which was partly freehold and partly copyhold, to his grandson, *William Meeke*, for life, with remainder to the first and other sons of *William Meeke* in tail male successively, "and in default of such issue the remainder to all and every my grandchildren, their heirs male and the heirs male of the survivors and survivor of them for ever."

*William Meeke* died in 1855 without issue.

The testator had nine grandchildren, who, under the ultimate limitation, were held to take joint estates for life with several estates of inheritance in tail male, with cross remainders in tail male between them.

Four of the grandchildren died previously to the 18th of January, 1858, without issue, and without having barred their estates tail. Another of them, Mrs. *Borrell*, had at that date died leaving issue a son, who was then living but died afterwards without having barred his estate tail and without issue.

M. R.
1875
TUFNELL
v.
BORRELL.

On the 18th of January, 1858, *R. B. Caton*, who was one of the grandchildren then living, executed a deed, in accordance with the provisions of the *Fines and Recoveries Act*, whereby, for the purpose of barring the estate tail of the said *R. B. Caton* in the property thereinafter described, he purported to grant all and singular his full and undivided part, share, and proportion, or full and undivided parts, shares, and proportions whatsoever of and in the freehold part of the property, freed and discharged from all estates and powers to take effect after or in defeasance of such estates tail to the use of himself in fee. None of the other grandchildren then living joined in or consented to this deed. *R. B. Caton* had died, having made a will whereby he devised his interest in the property to the Defendant, *R. R. Caton*.

The other grandchildren afterwards executed disentailing deeds of their shares, which were admitted to be valid as regards the freehold part of the property. No question arose as to the copyhold portion of the property, it being admitted that two only of the disentailing deeds affected it.

Mr. *Southgate*, Q.C., and Mr. *Pemberton*, for the Plaintiff.

Mr. *Roxburgh*, Q.C., and Mr. *North*, for the Defendant, *R. R. Caton*, submitted that the disentailing deed of the 18th of January, 1858, was effectual to bar the estate tail of *R. B. Caton* in the freeholds, *R. B. Caton* being protector in respect of the one-fourth share of which he was tenant for life; *Fines and Recoveries Act*, s. 23; *Church* v. *Edwards* (1).

Mr. *Fischer*, Q.C., Mr. *Waller*, Q.C., Mr. *Davey*, and Mr. *Oswald*, for other parties.

SIR G. JESSEL, M.R.:—

I think this case is tolerably plain. The gift is in these terms:—[His Honour read the will.]

There is no doubt that, there being no words of severance, the grandchildren took as joint tenants for life with several inheritances in tail male. It is also settled that in cases of this class, in the

(1) 2 Bro. C. C. 180.

M. R. 1875 TUFNELL v. BORRELL.

gift to the heirs male of the survivors, the term "survivors" must be read "others"; consequently the grandchildren took the several estates of inheritance in tail male with cross remainders between them.

That being so, a very singular point arises. There were originally nine grandchildren. Five of them died without barring their estates tail, and their issue ultimately failed. The other four barred their estates tail. As to three of the four no question arises, each of them taking one fourth of the estate. The question arises as to the fourth of these four. At the time when he barred his estate tail, he was (so far as is necessary to refer to the matter) entitled to one-fourth for life, with remainder as to one-fifth in tail male; and in case of the failure of issue of one of the deceased grandchildren (an event which afterwards happened) he was entitled to one-fourth of another fifth, that is, to one-twentieth, in tail male; that is to say, he had one-fifth for life and one-fifth in remainder in tail; and he had also one-fourth of another one-fifth for life, with a more remote remainder in tail in one-fourth of one-fifth. Was he protector of the identical undivided share of which he was tenant in tail? or was he merely protector of an equivalent aliquot share of the estate? The common sense of the thing is to make him protector of the same share of which he was tenant in tail. If he had been tenant for life of one-fourth, with an estate of inheritance in one-fourth, the case of *Church* v. *Edwards* (1) would have been a direct authority to that effect; and I think it is, on principle, an authority for the like conclusion in this case. I therefore hold that the estate tail of *R. B. Caton* in the freeholds has been well barred; and that one-fourth of the proceeds of the freeholds goes to the parties claiming under his will. As regards the copyholds no question arises: it is admitted that the proceeds of that part of the property are divisible into two equal shares.

Solicitors: Messrs. *Meynell & Pemberton;* Messrs. *Norris, Allens, & Carter;* Messrs. *Johnson & Weatheralls.*

(1) 2 Bro. C. C. 180.

## *In re* KENSINGTON STATION ACT.

V.-C. M.
1875
*Feb.* 13, 20.

*Abandonment of Railways Act*, 1850 (13 & 14 *Vict. c.* 83)—*Railway Companies Act*, 1867 (30 & 31 *Vict. c.* 127), *ss.* 31-35—*Abandonment of Railways Act*, 1869 (32 & 33 *Vict. c.* 114)—*Return of Deposit—Assets of the Company—Costs of obtaining the Act—Statute of Limitations.*

A Board of Trade warrant of abandonment of a railway, under the *Abandonment of Railways Act*, 1850, and the *Railway Companies Act*, 1867, was made with a condition that moneys deposited in the Court of Chancery as security should be applied as part of the assets of the company:—

*Held*, that the solicitor and parliamentary agent, not being promoters of the company, were entitled to be paid thereout their costs and charges for obtaining the Act.

The special Act gave a right to sue the company for the costs of obtaining the Act, and it incorporated the *Companies Clauses Act*.

By the *Companies Clauses Act*, s. 65, the money raised by the company is to be applied first in payment of such costs:—

*Held*, that the *Statute of Limitations* did not run against creditors in respect of such costs until the company had assets to meet the claims:

*Held*, that the remedy given by the special Act was in addition to, and not in substitution for the right given by the *Companies Clauses Act* to payment out of the first assets of the company.

2 C.L.D. 624
4 C.L.D. 857.
6 C.L.D. 380

THIS case came on upon two summonses from Chambers, one by Mr. *Reed* and another by Mr. *Anton*, the solicitor and the parliamentary agent who obtained the Act intituled the *Kensington Station and North and South London Junction Railway Act*, seeking to vary the Chief Clerk's certificate by allowing the claim of Mr. *Reed* for £924 and the claim of Mr. *Anton* for £226 1*s.* 6*d.*, being the balance of costs and disbursements as such solicitor and parliamentary agent.

The Act for making the railway was passed in 1859, a sum of £5760 having been deposited in respect of the application to Parliament. That sum was subsequently released upon the usual bond being executed by the railway company and by *Samuel Gurney*, of the firm of *Overend, Gurney, & Co.*, as their surety, conditioned to be void if the railway was opened within the time limited by the Act, or if it should be proved that the company had paid up and expended for the purpose of their Act one half of their authorized capital, or if the company should pay to Her

V.-C. M. 1875 *In re* Kensington Station Act.

Majesty the full sum of £5760. The powers of the Act expired in 1862, one half of the share capital was not paid up, and the railway was not constructed. The bond so given by the company and by *S. Gurney* was registered in the Common Pleas, and thus constituted an obligation affecting *Gurney's* estates. In July the firm of *Overend, Gurney, & Co.* sold their business to another firm of *Overend, Gurney, & Co., Limited,* which company stopped payment and was ordered to be wound up in 1866. In the course of the winding-up it became necessary to sell *Gurney's* estates under a charge given to *Overend, Gurney, & Co., Limited;* and in order to discharge the estates from any liability in respect of the bond of £5760, the whole sum was paid to the Treasury by the liquidators in satisfaction of the bond. An Act was passed on the 10th of August, 1872 (35 & 36 Vict. c. 80), by which the liquidators in the winding-up of *Overend, Gurney, & Co., Limited,* were empowered to apply to the Board of Trade for a warrant for the abandonment of the railway authorized by the Act of 1859 in the same way as if they had executed the bond as sureties for the company, and on such warrant being granted the Commissioners of the Treasury were to be at liberty to pay into the Court of Chancery, In the matter of the *Kensington Station Act,* the £5760 which, by reason of the non-completion of the railway, had been paid to the Paymaster-General on account of the Treasury; and such sum should be deemed to be the money deposited as security for the completion of the railway.

The Board of Trade, on the 14th of May, 1873, granted a warrant of abandonment of the above railway, with the following stipulation:—

"And the Board of Trade do hereby further declare and order that this warrant is granted and shall take effect upon the condition that the sum of £5760 in the *Kensington Station and North and South London Junction Railway Act,* 1859, (*Repayment of Moneys*) *Act,* 1872, referred to and directed to be declared to be the money deposited as security for the completion of the said railway, shall be applied as part of the assets of the said company."

The £5760 was paid into Court accordingly.

The *Kensington Station Company* was ordered to be wound up.

The present claims were that the sums so due to the solicitor and the parliamentary agent for the costs and expenses of obtaining the Act might be paid to them out of the £5760 so returned to the company, as part of their assets.

The special Act, by sect. 60, enacted that the costs of obtaining the Act should be paid by the company.

Mr. *Glasse*, Q.C., and Mr. *Heath*, for Mr. *Reed*, the solicitor of the company:—

We appear for one of the two creditors in support of this summons. Mr. *Reed* was the solicitor who was employed by the directors for the purpose of obtaining the Act of Parliament. His debt consists of the necessary costs and charges incurred as such solicitor. The only question is whether this debt is a charge upon the sum of £5760 which was deposited upon the application to Parliament for the Act, and has now been repaid under a warrant of the Board of Trade, and paid into the Court of Chancery. By the warrant of the Board it is expressly provided that the money shall form assets of the company, and the Board had full power to make this stipulation given them by the Act (30 & 31 Vict. c. 127, s. 31, sub-s. 3), which enacts that the Board may refuse to authorize the abandonment of a railway except on condition of the money deposited as security for the completion of a railway being applied as part of the assets of the company. There being assets of the company, we say the money is clearly chargeable in the first place with the payment of the costs and expenses of obtaining the Act, and all expenses incident thereto. This is provided for by the special Act of this railway (22 & 23 Vict. c. cxxviii.), s. 60, and by the *Companies Clauses Act* (8 Vict. c. 16), s. 65: *Tilson* v. *Warwick Gas Company* (1); *Carden* v. *General Cemetery Company* (2); *In re Tilleard* (3).

Then there is a further clause in the *Abandonment of Railways Act*, 1869 (32 & 33 Vict. c. 114), which provides by the 5th section that where money is returned upon the abandonment of a railway the Court may, if it think fit, direct that such money shall not be applicable for the payment of any debt which, regard being had to

(1) 4 B. & C. 962. (2) 5 Bing. N. C. 253.
(3) 3 D. J. & S. 519.

V.-C. M. 1875 *In re* Kensington Station Act.

what is fair and reasonable as between all the parties interested under all the circumstances of the case, appears to the Court to have been incurred on account of the promotion of the company. Consequently, if the debts now claimed had been incurred for the promotion of the company, the Court might exercise a judgment as to whether it was fair and reasonable, under all the circumstances, that they should be paid. But, in the first place, Mr. *Reed*, the solicitor, was not in any way a promoter of the company. He merely acted in his professional capacity in transacting the business necessary for passing the Act through Parliament, and therefore he does not come under this clause; and if ever the Court would exercise its judgment as to what was fair and reasonable between the parties, it would do so in a case like this, where the solicitor had nothing to do with the scheme of the railway beyond transacting the legal business.

In *In re Brampton and Longtown Railway Company* (1), where the Court refused to sanction the payment of the expenses incurred by the parliamentary agents in getting the bill passed through Parliament, it was on account of the agents having been also promoters of the company.

Mr. *Higgins*, Q.C., and Mr. *B. B. Rogers*, for *Anton*, the parliamentary agent:—

Our claim is for £226 1*s.* 6*d.*, the balance of the debt due to us for our costs in transacting the parliamentary business. The only question is whether we were promoters of the company or not. Mr. *Anton* was not a promoter of the company; he had no interest in it beyond the mere fact of being employed by the directors to take the necessary parliamentary steps for obtaining the Act.

There is another point set up against us by the liquidators, which is, that whatever may be our merits, and whatever discretion the Court may have under the Act of 1869, we are, nevertheless, barred by the *Statute of Limitations*.

To shew that the statute does not apply, we will look at the Act of Parliament. It must be remembered that *Overend & Gurney* gave a bond for the purpose of releasing the sum deposited upon obtaining the Act. That bond of itself would not be assets of the

(1) Law Rep. 10 Eq. 613.

company; but, upon the money represented by the bond being repaid, it was converted into assets of the company. At first it is only a security given to the Crown—a security either that the line shall be opened, or that half of the capital of the company shall be paid up. If that was not done, then the bond became forfeited to the Crown; but still it did not constitute assets of the company. By the *Companies Clauses Act*, s. 60, it is provided that the costs shall be paid out of the first assets. Now the company had no assets until this sum of money was repaid, therefore it was useless for the claimants to proceed for the recovery of their debt; in fact they would have had no right of action unless they could have alleged that the company had assets to meet the claim against them. This was the effect of the judgment in the case of *Carden* v. *General Cemetery Company* (1), where Chief Justice *Tindal* said it would have been a good ground of demurrer to the declaration that it did not allege that the Defendants had assets to satisfy the Plaintiff's demand. This principle is laid down in *Darby* and *Bosanquet* on the *Statute of Limitations* (2), where it is said, upon the authority of *Douglas* v. *Forest* (3), that no one has a complete cause of action until there is somebody that he can sue. Until 1873 the company had no assets, and there was no person whom the creditors could sue. The statute, therefore, did not begin to run till 1873. If it were not so the creditors could have no remedy, for they could not sue when the company had no assets, and they could not sue after six years on account of the statute.

Mr. *Cotton*, Q.C., and Mr. *Graham Hastings*, for the official liquidators:—

The principal objection we raise to these claims is that they are barred by the *Statute of Limitations*, and if not, this is not a case in which the Court will exercise the discretion given by the 5th section of the *Railways Abandonment Act*, 1869, in order to satisfy creditors who have lain by for so long a period as fourteen years.

If this money does not go to pay the debts of these claimants, it will, no doubt, go to the liquidators in *Overend, Gurney, & Co.*; and what, under the circumstances of this case, could be more fair

(1) 5 Bing. N. C. 253. (2) Page 33.
(3) 4 Bing. 686.

V.-C. M. 1875 *In re* KENSINGTON STATION ACT.

and equitable? Mr. *Gurney* came forward to assist the company in their difficulties; he became surety in the necessary bond, without which the undertaking could not have been launched; and upon the liquidation of the affairs of *Overend, Gurney, & Co.*, this money was actually paid over to the Government. Whose money then was it? It was not the money of the company, subscribed for carrying out the objects of the company, but it was *Overend, Gurney, & Co.'s* money. Mr. *Gurney* was not a promoter of the company; he was merely a banker, whose guarantee was of sufficient value to ensure the objects of the company. We admit that the solicitors and the parliamentary agents were not strictly promoters of the company, but the claims now made by them are claims arising in consequence of their being employed by the promoters. They did the work of the promoters, and should have been paid by them. It is as much a claim for promotion money as if expended by the promoters themselves. These charges were incurred before the passing of the Act, when the promoters were the responsible persons and not the company; and it is admitted that they did receive money in part-payment of their charges. But if it is a claim for the expenses attending the passing of the Act, then as soon as the company was formed they had a claim against the company which was expressly given them by the special Act for constructing this railway (22 & 23 Vict. c. cxxviii.). The 60th section of that Act provides "that all costs, charges, and expenses of and attending the passing of this Act, or incidental thereto, shall be paid by the company." The right of these creditors, therefore, was expressly limited to suing the company after its formation, and this right is substituted for any right they might otherwise have had upon the assets of the company under the *Companies Clauses Act.* If they had brought an action within the six years against the company, they might have obtained judgment. Instead of that they lie by for fourteen years, until the money which was paid by *Overend, Gurney, & Co.* should be repaid.

But suppose the Court should be of opinion that this money constituted assets of the company out of which the solicitors and parliamentary agents might be paid, still there is the 5th section of the *Abandonment of Railways Act*, 1869, which gives a discretion to the Court to do what is fair and just between the parties under

the circumstances of the case. The circumstances here are all in favour of the money being repaid to *Overend, Gurney, & Co.*, who were neither promoters nor interested in the promotion, but merely persons coming in to the assistance of those who were desirous of forwarding the undertaking.

Mr. *Glasse*, and Mr. *Higgins*, in reply.

Sir R. Malins, V.C.:—

This case is a very peculiar one, and certainly not free from difficulty.

In 1859 many gentlemen were engaged in promoting a bill in Parliament for making a *Kensington* station on the *North London Railway*, and for other purposes. They obtained their Act on the 13th of August, 1859. Mr. *Reed* is now the representative of a firm who were the solicitors for carrying on the proceedings to obtain the Act of Parliament. Mr. *Anton* was the parliamentary agent in obtaining the Act. Mr. *Anton* received some money from the promoters. It is doubtful whether Mr. *Reed* did. It is not suggested that the promoters were incapable of paying the bills of costs of their solicitor and their parliamentary agent. Whether Mr. *Reed* and Mr. *Anton* had a right or not against the promoters they did not exercise it; and they were at liberty to forbear the demands against them if they thought fit; and up to this time, fifteen or sixteen years after the Act was passed, it is not in dispute that the solicitor and the parliamentary agent are—the solicitor wholly, and the parliamentary agent partially—unpaid. It is said that there is now an asset of the company out of which they ought to be paid. That arises in this way: The Act could not have been obtained without a bond being given that half of the capital for the purposes of the Act should be subscribed. The firm of *Overend, Gurney, & Co.* were applied to to give a bond that that should be done. Mr. *Gurney*, a member of the firm, was solicited to give that bond, and he did give a bond that half the capital of the company should be taken. That bond remained in force until a recent period. The railway has never been made, and a warrant from the Board of Trade, dated the

V.-C. M. 1875 *In re* Kensington Station Act.

14th of May, 1873, has been obtained for the abandonment of the undertaking.

But before this was done, *Overend, Gurney, & Co., Limited,* having been wound up in this branch of the Court, all the debts having now been paid, there being certain estates of Mr. *Gurney* to be realized, it was found that those estates could not be sold until this bond to the Crown was got rid of. The liquidators of *Overend, Gurney, & Co.* found it requisite to pay the amount of the bond as the price of obtaining the delivery up of the bond and getting rid of the incumbrance on the estate. That sum is now in Court, and the contention of Mr. *Reed* and Mr. *Anton* is that they are entitled to be paid out of that fund.

The Act of Parliament which enabled the Board of Trade to grant the warrant of abandonment is the 30 & 31 Vict. c. 127, and the 3rd sub-section of sect. 31 provides this:—"Nothing in the said Act of 1850, or this Act, shall be deemed to make it obligatory on the Board of Trade to authorize the abandonment of a railway or part of a railway on any application in that behalf, and the Board of Trade shall not authorize such abandonment in any case, unless it appears to them just and expedient so to do; and the Board of Trade may, if they think fit, refuse in any case to authorize such abandonment, except on condition of the money deposited as security for the completion of the railway, or the stock, funds, or securities on which the same is invested, or the money secured by any bond conditioned for completion of the railway or for payment of money in default thereof, being applied as part of the assets of the company." It was completely, therefore, within the powers conferred upon the Board of Trade to make the order for the abandonment of the railway, dated, as I have said, the 14th of May, 1873; and the condition upon which they did so is strictly in conformity with the Act:—"And the Board of Trade do hereby further declare and order that this warrant is granted and shall take effect upon the condition that the sum of £5760 in the *Kensington Station and North and South London Junction Railway Act*, 1859, (*Repayment of Moneys*) *Act*, 1872, referred to and directed to be deemed to be the money deposited as security for the completion of the said railway, shall be applied as part of the

assets of the said company." They had power to do that, and they have done it; and I think I am bound, therefore, to treat this sum of £5760 as part of the assets of the company, just the same as if it had arisen by half the capital having been subscribed for and paid up. Mr. *Gurney* undertook to guarantee that. I am at a loss to see any ground upon which, because he supplied the money, those having claims upon the company can be in a less favourable position than they would have been in if the money had been provided, as he had guaranteed, by payment of half of the capital. I must, therefore, treat this as part of the assets of the company.

Then this sum being assets of the company, it is clearly liable to pay the debts of the company. Now, are these claims debts which the company are liable to pay? As far as merits are concerned there is no question about it. Mr. *Reed* and Mr. *Anton* have sworn that they were in no way in the position of promoters of the company. The promoters would be those gentlemen who afterwards became the directors. Mr. *Reed* was the solicitor, and Mr. *Anton* the parliamentary agent. They were not promoters of the company, but persons who ought to have been paid by the promoters. They were not so paid. What are the provisions of the law? I will take it first as if it depended on the *Companies Clauses Act* (8 Vict. c. 16), s. 65, which enacts: "That all the money raised by the company, whether by subscriptions of the shareholders, or by loan, or otherwise, shall be applied, firstly, in paying the costs and expenses incurred in obtaining the special Act, and all expenses incident thereto; and, secondly, in carrying the purposes of the company into execution;" that is, the money shall be applied first in paying costs and expenses. The counsel for the liquidators, in opposing these claims, relied mainly on the *Statute of Limitations*, and they say, with a considerable shew of justice, "Here is a debt which has existed for fifteen years, the statute has barred the claim, and this is a stale demand, to which no attention ought to be paid."

Now, what was the situation of these gentlemen? Up to the 14th of May, 1873, it is perfectly clear that there was not an asset of the company which could possibly pay them. If, therefore, the question depended entirely upon the *Companies Clauses Act*, it

V.-C. M. 1875 *In re* KENSINGTON STATION ACT.

seems to me that the *Statute of Limitations* is excluded, because there is, as I read the section, a continual obligation on the company out of their first assets to pay the expenses of obtaining the Act of Parliament. That obligation does not cease because they do not have assets for a considerable time. It happened in this case that they had no assets for fourteen years. Suppose they had had assets immediately after the expiration of the six years, why is the debt to be barred? It is to be paid out of the first assets, and the money is to be applied first in payment of these expenses. How can the *Statute of Limitations* run against parties who do not apply for payment when they know that there is nothing to pay them with? I quite agree that in the case of a man owing a debt the *Statute of Limitations* is not saved because he has no means of paying. Whether he can pay or not, there the debt is incurred, and the statute begins to run. But in this case the *Statute of Limitations* has no application till the period arrives when there is something to pay with. They are to pay the expenses out of the first moneys they receive. They had the first money on the 14th of May, 1873; and then, and, in my opinion, not till then, the *Statute of Limitations* began to run.

That conclusion rests upon principle, and also upon authority. I refer to *Carden* v. *General Cemetery Company* (1). Mr. *Carden* was the promoter of cemeteries generally, and particularly of the cemetery at *Kensal Green*. He incurred very considerable expenses in establishing that cemetery, or rather in obtaining the Act of Parliament for it. He brought an action against the company after its incorporation for payment of those expenses and his costs. His case rested upon the 20th section of the Act, which enacted "That all the money to be raised by the company by virtue of this Act shall be laid out and applied, in the first place, in payment of and discharging all costs and expenses incurred in applying for, obtaining, and passing this Act, and all other expenses preparatory or relating thereto, and the remainder of such money shall be applied in and towards purchasing lands, tenements, and hereditaments," and for other purposes. There, like the present case, under the general Act he had no right to be paid until there was money due to him. He was to be paid out of the first moneys. An objection was taken

(1) 5 Bing. N. C. 253.

to his action, that he did not aver that there were moneys. If he was bound to bring his action within six years, why was he to make the averment? Chief Justice *Tindal*, in giving judgment, says (1): "It was next objected, on the part of the Defendants, that the declaration does not state that the Defendants had any money in their hands at the time the Plaintiff demanded his debt, or, at all events, that they had sufficient in their hands to satisfy the demand of the Plaintiff. And if this objection had been made the ground of a special demurrer to the declaration, it might perhaps have been held that the allegation was insufficient for that purpose. But the declaration does, in fact, allege that the company, after the passing of the Act, under and by virtue of the Act, did receive divers sums of money out of which they might and ought to have paid and satisfied the Plaintiff; and we think this amounts in substance to an averment that the company had enough to satisfy the Plaintiff's demand, and therefore is sufficient upon a general demurrer." What is the fair result of those observations of the Lord Chief Justice? That if he brought his action at any time without being able to aver that they had money, the action would fail. If, until he can aver that, he has no right to bring an action, then the statute must run from the time when he is in a situation to maintain an action. If it is a condition precedent to bringing an action that a man must aver there are funds out of which he can be paid, then the time begins to run only when that state of things exists which entitles him to maintain an action; and that state of things does not exist until he can aver in his declaration that the Defendants have money in their hands wherewith he can be paid. So far as it depends upon the general Act—the *Companies Clauses Act*—it was a condition precedent to the Plaintiff being able to maintain an action, and if an action, then a suit in this Court, that he should aver that the time had arrived when the Defendants had assets in their hands; and as soon as they have assets in their hands his right arises, and from that time only the statute begins to run.

Then it was argued by Mr. *Cotton* that the 60th section of this particular Act alters this; and that section provides that "All costs, charges, and expenses of and attending the passing of this

(1) 5 Bing. N. C. 259.

V.-C. M. 1875 *In re* Kensington Station Act.

Act, or incidental thereto, shall be paid by the company." It is perfectly clear that that did give to Mr. *Reed* and Mr. *Anton* a right to sue the company, and they might have obtained judgment against them. Is that an additional or a substituted remedy? The Act of 1859, by the 2nd section, enacts this: "The *Companies Clauses Consolidation Act*, 1845, the *Lands Clauses Consolidation Act*, 1845, and the *Railways Clauses Consolidation Act*, 1845, are hereby incorporated with this Act." It does not say "incorporated except as hereinafter altered," but they are incorporated generally. That, therefore, clearly gives all parties interested every remedy provided for them by the *Companies Clauses Act*. Then by the 60th section they are enabled to sue the company, which is an additional remedy—a cumulative remedy and not a substituted remedy. They have a right to sue under this Act whether there are assets or not. It does not take away the old remedy; and for the reasons I have stated, I think the *Statute of Limitations* did not begin to run until the assets were in existence.

Then it is said that another Act of Parliament applies, namely, the *Railways Abandonment Act*, 1869. The 5th section enacts, "If the warrant for the abandonment was made on condition"—as it was here—"that the money deposited as security for the completion of the railway, or the stocks, funds, or securities in which the same is invested, or the money secured by any bond conditioned for the completion of the railway, or for payment of money in default thereof, should be applied as part of the assets of the company, the Court may, if it think fit, direct that such money, stocks, funds, and securities shall not be applicable for the payment of any debt, or part of a debt, which, regard being had to what is fair and reasonable as between all the parties interested under all the circumstances of the case, appears to the Court to have been incurred on account of the promotion of the company." Now upon that subject Mr. *Cotton* says: "Here is a solicitor promoting this bill, a parliamentary agent doing the same thing, and *Overend, Gurney, & Co.* doing the same thing by giving this bond." I think, by the affidavit of Mr. *Reed*, it is perfectly clear that he undertook this business relying upon the representation of the firm, or one of the firm, that they had guaranteed that the capital should be taken to the extent I have mentioned; and although this bond was not in

force, as the money was brought into Court, I cannot see that there was any joint scheme in promoting this bill; and I am of opinion, therefore, that this money must be treated as if it had been produced by the shares actually being taken and paid for to the extent of one-half; and there is nothing unreasonable in the money being paid, although it was for the promotion of the company, but not to the promoters of the company. What was said by Mr. Justice *Bayley* and Mr. Justice *Holroyd* in *Tilson* v. *Warwick Gas Company* (1) is applicable to the case, and shews that this is not a case where the *Statute of Limitations* would run under the circumstances. The case before Vice-Chancellor *Bacon* proceeded upon the ground that the party there was a promoter, consequently I am not deciding in opposition to that case.

I am of opinion that the money in question must be taken as part of the assets of the company, and that it is expressly made so by the order of abandonment. I think the *Statute of Limitations* did not begin to run until these assets were in existence; and although the applicants might have brought an action against the company under the 60th section of the Act, that does not take away any remedy independently of the section; and the two debts must, therefore, be paid out of the assets in this Court.

I decide, therefore, that the bills of costs of Mr. *Reed* and Mr. *Anton* properly incurred before the passing of the Act are to be paid out of the assets, with interest in both cases at £4 per cent. from the date of the claim being brought in; and the costs of this application will be added to the debt. The liquidators' costs will be paid out of the estate.

Solicitors for Mr. *Reed:* Messrs. *Phelps & Sidgwick.*

Solicitors for Mr. *Anton:* Messrs. *Miller & Smith.*

Solicitors for the Official Liquidators: Messrs. *Jones, Roberts, & Hale.*

(1) 4 B. & C. 962.

V.-C. M.
1875
April 21, 26.

## ROSHER *v.* WILLIAMS.

[1872 R. 144.]

*Voluntary Deed—27 Eliz. c. 4—Consideration—Covenant to commence building a House—Aged Vendor.*

A deed conveying the whole of the real estate of the grantor, and otherwise voluntary, contained a covenant by the grantee under certain specified circumstances to build a house on part of the estate conveyed within a limited period, but there was no shifting clause or provision for defeasance in case of non-performance of the covenant:—

*Held*, that the covenant raised no consideration affecting the voluntary nature of the contract, and specific performance decreed of a contract (subsequent to the settlement) made by the settlor for sale of part of the estate.

THIS was a purchaser's suit for specific performance.

The Plaintiff was the owner of an estate in the county of *Monmouth*, part of which surrounded on three sides a meadow of 2A. 3R. 32P. in extent, which before the 17th of November, 1868, belonged absolutely to the Rev. *John Williams*.

By an indenture of that date, made between Mr. *John Williams* of the first part, his great nephew, the Defendant, *Thomas Samuel Ostler Williams*, of the second part, and *Vaughan Barber* of the third part, which recited that in consideration of the natural love and affection which he bore for and towards *Thomas Samuel Ostler Williams*, he had agreed to convey and give to him all and singular the messuages, farms, lands, and hereditaments thereinafter described, subject to and charged with the payment of the several annuities or yearly sums thereinafter mentioned, to the several persons thereinafter named for their respective lives, and in consideration of such conveyance and gift *Thomas Samuel Ostler Williams* had agreed to enter into the covenant thereinafter on his part contained to erect and build at his expense a messuage or dwelling-house upon the farm or estate thereinafter mentioned, to be called by the name of *Brin Arrow*, otherwise *Brynaro*, in the manner thereinafter expressed, It was witnessed that, in pursuance of the said agreement in that behalf, and in consideration of the natural love and affection which *John Williams* bore to *Thomas Samuel Ostler Williams*, *John Williams* granted and con-

veyed to *Vaughan Barber* an estate therein described, of which the above-mentioned meadow and the farm referred to in the covenant stated below formed part, to the use and intent that certain persons therein named should receive certain annuities for their lives, and by half-yearly payments, and to the use that the annuitants should have powers of distress for recovering the annuities if in arrear, and subject to the annuities and the remedy thereby created for securing the payment thereof, to the use of *Thomas Samuel Ostler Williams*, his heirs and assigns, for ever. And the indenture proceeded as follows:—

"And the said *Thomas Samuel Ostler Williams* doth hereby for himself, his heirs, executors, and administrators, covenant with the said *John Williams*, his executors and administrators, that he the said *Thomas Samuel Ostler Williams*, his heirs or assigns, shall and will within ten years to be computed from the day of the date of these presents, at the costs and charges of him the said *Thomas Samuel Ostler Williams*, his heirs or assigns, commence to erect or build or cause to be commenced upon the said farm or estate called *Brin Arrow*, otherwise *Brynaro*, the erection or building of a messuage or dwelling house, suitable in character, value, and locality to the said farm or estate, according to the plans and specifications to be hereafter approved of by the said *John Williams*, such approval to be testified by his signature thereto, and to be delivered by him to the said *Thomas Samuel Ostler Williams*, or left for him at his most usual place of residence or abode. And further, that if the said *John Williams* shall not, within the said period of three years to be computed from the date of these presents, sign and deliver to the said *Thomas Samuel Ostler Williams*, or leave for him as aforesaid, the plans and specifications of a house to be built on the said farm or estate, then and in that case he the said *Thomas Samuel Ostler Williams*, his heirs or assigns, shall and will, on the expiration of the said period of three years, or as soon as conveniently can be after the decease of the said *John Williams*, in case he shall die before the expiration of the said term, at the proper costs and charges of him the said *Thomas Samuel Ostler Williams*, his heirs, executors, or administrators, erect and build, or cause to be erected or built, such messuage or dwelling-house upon the said farm or estate as

V.-C. M. 1875 ROSHER v. WILLIAMS.

he the said *Thomas Samuel Ostler Williams*, his heirs or assigns, shall think fit and proper or suitable to be erected and built thereon."

Notwithstanding the execution of the deed, the name of *John Williams* remained on the rate books, and nothing was done which could give persons unacquainted with the family knowledge that any change of ownership had taken place, except that some time subsequently *T. S. O. Williams* was put upon the register of voters for the county, on a qualification derived from some part of the property conveyed by the deed, and the Plaintiff, believing *John Williams* to be the owner of the estate, commenced negotiations with him for the purchase of the meadow by an offer of £300, which was not accepted.

On the 9th of April, 1872, *John Williams* called upon the Plaintiff, and offered to sell the meadow to him for £400. This offer the Plaintiff agreed to accept, and proposed that a solicitor should be employed to prepare a contract. *John Williams*, however, said that this was unnecessary, and the Plaintiff thereupon called in his son, who was in an adjoining room, and he wrote out and copied the following agreement:—

"I, the Reverend *John Williams*, agree to sell to *Jeremiah Burch Rosher*, Esquire, a meadow, together with the fences and trees as they now stand, and numbered one hundred and forty-six (146) in the parish map of *Llanvihangel Crucorney*, in the county of *Monmouth*, and therein stated to contain, in statute acres, two acres, three roods, and thirty-two perches (2A. 3R. 32P.), for the sum of four hundred pounds (£400).

The sale to be completed by the 1st of August next. Dated this 9th day of April, one thousand eight hundred and seventy-two. (Signed) "*John Williams*,

"*Jeremiah Burch Rosher*.

"Witness, *J. Lilburn Rosher*."

The Plaintiff handed the contract to his solicitor, who, on the 15th of April, 1872, wrote to *John Williams* with a view to the completion of the purchase. *T. S. O. Williams* then, through his solicitors, put forward his claim to the property, and a correspondence followed which resulted in the latter declining to complete the purchase.

At the date of the contract, *John Williams* was nearly ninety-two, and he died on the 16th of July, 1872, having by his will, which was dated the 3rd of August, 1865, made a disposition of his real estate similar in substance to that in the deed of 1868.

The bill was filed against *T. S. O. Williams;* and *John Leftwich*, the executor of *John Williams*, was made a Defendant by amendment.

A case was attempted to be made by *T. S. O. Williams* that *John Williams* was from infirmity incapable of entering into a valid contract on the 9th of April, 1872, and it did appear that shortly before his death, and during a portion of his last illness, he was in a state of mental incapacity; but there was strong evidence, on the other hand, that he was at the date of the contract in full possession of his faculties, and was treated by every one as being quite competent to manage his own affairs.

The result of the evidence was, that the price agreed to be given for the meadow was beyond its value.

It appeared that the deed of the 17th of November, 1868, included all the real estate of *John Williams.*

Mr. *Glasse*, Q.C., and Mr. *E. T. Holland*, for the Plaintiff:—

The deed of the 17th of November, 1868, is purely voluntary, and, under 27 Eliz. c. 4, is void against the Plaintiff, who is in the position of a purchaser for value. Having a binding contract, he is in as good a position as if his purchase had been completed: *Buckle* v. *Mitchell* (1); and there is no consideration expressed in the deed which makes it other than voluntary. The covenant to build forms no such consideration. In order to establish a valuable consideration for a settlement some benefit must be shewn moving from the grantee to the settlor. Here no possible benefit could arise to the settlor from the covenant, because the whole of *John Williams'* real estate being included in the conveyance, nothing was left by which he could derive benefit from the building. There is, moreover, no defeasance in case the house were not built, and no shifting clause, and the deed left it quite optional whether the house was built or not.

The contract is unimpeachable on other grounds. There was no

(1) 18 Ves. 100.

V.-C. M. 1875 ROSHER v. WILLIAMS.

inadequacy of value, and the mere fact of one of the contracting parties being old, and no professional man being employed, cannot affect its validity, especially where it was his own choice not to have professional assistance: *Harrison* v. *Guest* (1).

Mr. *Bristowe*, Q.C., and Mr. *Meyricke*, for the executor, declined to consent to *T. S. O. Williams* receiving the purchase-money.

Mr. *Higgins*, Q.C., and Mr. *Kekewich*, for *T. S. O. Williams*:—

The doctrine of the Court in specific performance suits is very different from that in cases of setting aside deeds such as *Harrison* v. *Guest*. It is unnecessary to prove over-reaching or inadequacy of price if there are equitable circumstances affecting the contract. Such circumstances are the extreme old age of Mr. *Williams*, and the fact that he had no sort of assistance or advice in concluding it. These circumstances bring the contract within such cases as *Longmate* v. *Ledger* (2), *Baker* v. *Monk* (3), and *Clark* v. *Malpas* (4). The Court would not have made a decree against *Williams* himself, and those who represent him can be in no worse position. There is certainly reasonable ground for doubting whether *John Williams* understood that he had entered into a binding contract: *Vivers* v. *Tuck* (5).

Then as to the want of consideration, it is only necessary to shew a very slight consideration, and the mere circumstance that the deed does not represent the transaction as otherwise than voluntary is nothing. The consideration may be shewn *aliunde*. Where there is no element of fraud, almost any kind of consideration will be sufficient. The Court has gradually come almost to adopt the view which was expressed by Sir *W. Grant* in *Buckle* v. *Mitchell* (6), that the operation of the Act of *Elizabeth* had been too widely extended. The recent decisions of *Townend* v. *Toker* (7) and *Bayspoole* v. *Collins* (8) have reduced the requirement of a consideration to the slightest proportions. On those authorities the consideration in this case is quite sufficient to support the settlement. The covenant is one on which an action might have been brought.

(1) 8 H. L. C. 481; 6 D. M. & G. 424.
(2) 2 Giff. 157.
(3) 4 D. J. & S. 388.
(4) 4 D. F. & J. 401; 31 Beav. 80.
(5) 1 Moo. P. C. (N.S.) 516.
(6) 18 Ves. 100.
(7) Law Rep. 1 Ch. 446.
(8) Ibid. 6 Ch. 228.

It is unnecessary that the settlor should derive personal benefit from the transaction. In *Thompson* v. *Webster* (1) it was held sufficient that the settlement was upon the wife and children of the settlor. There is as good a consideration here as in *Crosbie* v. *M'Doual* (2) and *Skidmore* v. *Bradford* (3). If *John Williams* had, instead of conveying the estate, only promised to convey it, the voluntary nature of the transaction would not have been a defence to a suit to carry out the promise: *Parsons'* Law of Contract (4).

[The VICE-CHANCELLOR:—*Wildes* v. *Dudlow* (5) was a case depending upon considerations somewhat similar to *Skidmore* v. *Bradford.*]

Moreover the annuitants ought to have been made parties, their security being diminished if a decree is made: *Willats* v. *Busby* (6).

Mr. *Glasse*, in reply.

SIR R. MALINS, V.C., after stating the facts, continued:—

The proposal for the purchase coming not from the purchaser but from the vendor, the circumstance exists in this case which existed in the case of *Harrison* v. *Guest* (7), in which Sir *R. Kindersley* decided that there was no binding contract. Here is a transaction perfectly fair in all points. There Mr. *Guest* being asked by an old man to buy an estate, bought it for what all parties agreed was an utterly inadequate consideration, namely, for an annuity for the residue of a man's life over seventy years of age, of a very precarious character, and Sir *R. Kindersley* thought that the contract, being at such an undervalue, ought to be set aside, and made a decree accordingly after the old man's death. However that came before Lord *Cranworth*, and in several passages the grounds upon which it is put are entirely applicable to this case. He says (8): "It is hardly consistent to suppose he would

(1) 4 De G. & J. 600.
(2) 13 Ves. 148.
(3) Law Rep. 8 Eq. 134.
(4) Vol. iii. p. 358.
(5) Law Rep. 19 Eq. 198.
(6) 5 Beav. 193.
(7) 8 H. L. C. 481; 6 D. M. & G. 424.
(8) 6 D. M. & G. 434.

V.-C M. 1875 ROSHER v. WILLIAMS.

have made a stand upon such insignificant matters as those I have alluded to. The result was that there was a purchase for what turns out to be an extremely inadequate consideration. That, however, is of no consequence if the parties were in a situation to judge for themselves, and this makes the question as to the poor old man's state of mind at the time he entered into this bargain very material." Then lower down he says: "If upon the proposal being made Mr. *Guest* had at once caught at it." So in this case, if Mr. *Rosher* had at once caught at the proposal very strong observations might have been made, but he, like Mr. *Guest*, gave the old man time to consider. Then Lord *Cranworth* says: "If it had been proved that *Hunt* was a man incapable of making a bargain for himself, I should have set aside the transaction. But so far from finding any such reason for interfering, it is proved that Mr. *Guest* not only did not catch at the bargain, but desired *Hunt* to take time to consider about it, and then left the neighbourhood and was absent for a fortnight." Again, Lord *Cranworth* says (1): "He seems to have been pleased with the change, and it appears that he was in a more cleanly and happy state with more comforts about him. He had all that; and unable as I am to discover any obligation on Mr. *Guest's* part to shew that *Hunt* had more by way of consideration than he asked for himself, and unable as I am to discover anything in the evidence for the suggestion that there was any endeavour to keep from him professional advice; on the contrary, being satisfied that there was, as far as there could be, a desire that he should have professional advice, that there was no imposition practised upon him, that he was left to form his own judgment, that no haste whatever was exhibited, but that, on the contrary, he was left to take his own time, and that he nevertheless persevered in his inclination, and perfectly well understood what he was doing; I confess I am unable to arrive at the conclusion to which the Vice-Chancellor has come. I think, therefore, that instead of the decree which was made, this bill ought to have been dismissed, but I think it ought not to have been dismissed with costs, for this reason: Mr. *Guest's* answer about the sum of money to be paid to *Hunt*, although the explanation is a very reasonable one, was calculated to mislead; and if that

(1) 6 D. M. & G. 437.

had been otherwise stated, it is possible that the bill might not have been filed, or further proceedings at least might have been discontinued; and under these circumstances I think the bill ought to have been dismissed, nothing being said about costs." That case went to the House of Lords. The House of Lords, for very much the same reasons, came to the same conclusion as Lord *Cranworth*, and the decision of Lord *Cranworth* was affirmed.

With regard to the price and the circumstances of this contract, there was nothing unfair. It was sought by the vendor, I will not say it was forced upon the purchaser, but it was certainly pressed upon him. No advantage was taken of the vendor. Now, was he incapable? The case was at first very much rested upon the fact that he was ninety-two years of age, and therefore the contract ought not to be performed. But no such rule can be laid down. Nobody would have said that if this old man had made a will the next day after the contract, his will was not valid; and I am unable to see any principle on which it can be said that entering into a contract to sell a field for at least £100 more than it was worth was any evidence of incapacity; and I think it would be unsafe to come to the conclusion that merely because he was ninety-two years of age the contract he had entered into was to be disregarded.

[His Honour then discussed the evidence relating to the question of Mr. *Williams*' capacity to contract, and concluded that it shewed that there was no mental failure till after the 17th of June. He then continued:—]

If, therefore, Mr. *John Williams* had been the Defendant in this cause, and had been seised in fee simple, absolutely free from all questions about voluntary settlement or otherwise, I could not have hesitated in coming to the conclusion that this contract was entered into under such circumstances as made it binding upon him. Although it is true that this Court exercises a discretion in cases of specific performance, and requires that any one asking for that relief should make a clear case and come into Court with clean hands, and that there must be no over-reaching or taking advantage, and no undervaluing as against a person who is unable to take care of himself, all these circumstances are absent.

Then comes the question, what is the effect of the deed of 1868,

V.-C. M. 1875 ROSHER v. WILLIAMS.

which on one side is treated as a voluntary settlement, and on the other as being one for valuable consideration? If this is a voluntary settlement, then, though I concur with the view expressed by Sir *William Grant* in *Buckle* v. *Mitchell* (1), and acquiesced in by other Judges, that the law that a man who has executed a voluntary settlement is enabled under the statute of the 27 Eliz. to sell the estate, just as if he had done nothing, is highly unreasonable, I take it to be perfectly settled that the owner of an estate, after making a voluntary settlement, is, as between him and a purchaser from him, as much seised in fee as if he had not put his hand to such a settlement. He cannot enforce specific performance, but having entered into a contract with a purchaser, the purchaser, as against him, can do so, and the voluntary settlement is nothing more than a piece of waste parchment.

Now, with regard to the doctrine of what is a voluntary settlement, I quite agree with the argument I have heard from Mr. *Higgins* and Mr. *Kekewich*, that the modern decisions may be considered as having to a considerable extent qualified the old rule of the Court. In that view of the case I quite agree that *Townend* v. *Toker* (2) is a very material authority, and I think the fair result of them all may be thus stated: that if upon the occasion of executing that which is called a voluntary settlement, that is, a deed which is not induced by marriage or any marriage considerations, or the actual sale of property; if between a father and son, husband and wife, or parent and child, in any way whatever, an instrument is executed which ordinarily is called a voluntary settlement, and it turns out that, instead of being purely voluntary, any consideration whatever was paid or given, or any benefit rendered to the grantor, even such as an agreement to relieve the grantor from the immediate payment of a debt, as in *Bayspoole* v. *Collins* (3), the Court will anxiously lay hold of any circumstances constituting a consideration moving from the grantee to the grantor, to take a case out of the category of voluntary settlements.

Now, the result of this settlement is, that property is conveyed by it, and the deed of conveyance contains a covenant so vague

(1) 18 Ves. 100. (2) Law Rep. 1 Ch. 446.
(3) Law Rep. 6 Ch. 228.

that I do not think anything could have been recovered upon it. The covenant can be of no pecuniary advantage to the grantor, because if he has conveyed away the fee simple of his property it can be of no consequence to him whether the house is built upon it or not. It may be a matter of fancy or gratification to him that it should be so, but if the grantee simply contracts that he will build a house on his own property, and he omits to do so, what advantage has the grantor? If he had said that unless the house were built the deed shall be void, and had reserved a power of re-entry on that event, that would have been a different thing. But there is no penalty attached, and all he contracts to do is that he will commence to build. He does not covenant that he will commence and finish. I cannot regard the contract as being in any way binding. It is, moreover, only such a house as he thinks fit to build. At all events, no consideration is shewn moving from the grantee to the grantor. Therefore, as the grantor by the grant does nothing but deprive himself of the property and gets nothing in return, it seems to me, after all I have heard, that this must be regarded as a purely voluntary deed.

Then the contract is one entered into with a vendor seised in fee to sell property for its full, and much more than its market value, under circumstances free from all imputation of impropriety of conduct. The Defendant has thought fit to resist the contract, most unreasonably, in my opinion; and if, instead, he had made some other proposal, this litigation might have been prevented.

Under these circumstances, there must be a decree for specific performance, with costs.

Solicitors: Mr. *R. J. Child;* Mr. *Walter Justice;* Messrs. *Singleton & Tattershall.*

V.-C. B.
1875
Feb. 10.

## OLIVANT *v.* WRIGHT.

[1873 O. 18.]

*Will—Construction—Tenant for Life—"Die without issue"—"Die leaving issue."*

Testatrix being possessed of separate property, gave and bequeathed to her husband all her real and personal property for her life, and after his death "to be divided amongst" her five children, share and share alike; "and if any of my children should die without issue, then that child or children's share shall be divided, share and share alike, among the children then living; but if any of my children should die leaving issue, then that child, if only one, should take its parent's share; if more than one, to be divided equally amongst them."

Testatrix left five children, all of whom survived the tenant for life. One died, leaving children:—

*Held*, that her share went over to her children.

Afterwards another died, without issue:—

*Held*, that his share went to the three surviving children.

The fourth rule in *Edwards* v. *Edwards* (1), that a gift over in the event of death without issue takes effect only upon such a death in the lifetime of the tenant for life, has been abrogated by *O'Mahoney* v. *Burdett* (2) and *Ingram* v. *Soutten* (3).

Overruled by C. of A. 1881 L.R. 16 Ch.D. 246

ADJOURNED SUMMONS.

*Ann*, wife of *James Nicholson*, being possessed of separate property, made her will, dated the 29th of November, 1844, in the following terms:—

"I order and direct all my just debts, funeral and testamentary expenses, to be paid out of my personal estate by my executor hereinafter named. And I give and bequeath unto my husband, *James Nicholson*, all my real and personal property, whether houses, land, or whatever else I am entitled to from my late aunt's estate, and all other effects belonging to me wheresoever they may be at the time of my decease, during his natural life, to receive all the rents, interests, and profits arising from them, for his own use, and after his decease to be divided amongst

(1) 15 Beav. 357. (2) Law Rep. 7 H. L. 388.
(3) Law Rep. 7 H. L. 408.

my five children, share and share alike; and if any of my children should die without issue, then that child or children's share shall be divided, share and share alike, among the children then living; but if any of my children should die leaving issue, then that child (if only one) should take its parent's share; if more than one, to be divided equally amongst them, share and share alike. And I also nominate and appoint my husband, *James Nicholson*, my sole and only executor."

The testatrix died on the 31st of August, 1846, leaving her husband and five children surviving; and her will was proved by *James Nicholson*, the husband and executor, on the 4th of March, 1847.

*James Nicholson* died on the 23rd of March, 1857.

One of the five children, named *Martha*, having married *Richard Parkinson*, died on the 7th of April, 1868, intestate, leaving her husband and four children (two of whom were by a former marriage) surviving.

Administration to Mrs. *Parkinson's* estate was, on the 12th of December, 1872, granted to her husband, *Richard Parkinson*.

The suit was instituted for the partition of certain settled real and personal estate, to one-fifth of which *Ann Nicholson* was entitled for her separate use; and on the 28th of July, 1873, a decree was made, ordering inquiries, and directing a sale.

Since the decree another of the children of the testatrix had died without issue.

This summons was taken out by the four children of Mrs. *Parkinson*, for a declaration that, under the will, they were entitled in equal shares as tenants in common to one-fifth of the testatrix's estate, in consequence of the death of their mother, *Martha Parkinson*, "leaving issue," and also to an accruing share of and in any other share by the will given to any other of the testatrix's five children who had died or might die without issue.

Mr. *Richard Parkinson*, on the other hand, as administrator of his wife, claimed to be entitled to her estate absolutely.

Mr. *Everitt* for the summons:—

The questions are, whether the children of the testatrix, having

V.-C. B. 1875 OLIVANT v. WRIGHT.

all survived the tenant for life, take absolute interests, or whether they take life interests only, with remainder to their issue, if any, or, if no issue, to the others; and whether, upon the death of a child of the testatrix without issue, after the death of a child leaving issue, the share of the secondly deceased child is to go to the three survivors only, or to the three survivors and the children of the firstly deceased child in equal shares *per stirpes*.

The fourth of the rulings laid down in *Edwards* v. *Edwards* (1) has been set aside, as a general proposition, by the decision of the House of Lords in *O'Mahoney* v. *Burdett* (2), reversing the decision of the Court of Appeal in Chancery in Ireland (3); and by another decision of the House of Lords the same day, in *Ingram* v. *Soutten* (4), reversing a decision of the Court of Appeal in Chancery in England, reported under the name of *In re Heathcote's Trusts* (5).

The result of these authorities is that the divesting clause is not limited to death in the lifetime of the tenant for life.

Mr. *Ince* for the Respondent:—

The ruling in *Edwards* v. *Edwards* is not in the least impugned by the decision in the House of Lords. The result of the observations of the Lord Chancellor, Lord *Hatherley*, and Lord *Selborne* is, that no canon of construction, such as the Master of the Rolls laid down, is, in cases of this particular class, admissible—that the Court must put its own construction upon each will.

The only canon here applicable is, that the Court will adopt that rule of construction which will soonest vest the estates of the parties.

The result of such a rule is, that *Martha Parkinson*, upon her surviving the tenant for life, took a vested, indefeasible interest.

What is it that the testatrix has disposed of? Not rents, dividends, and income, but "all my real and personal property;" that

(1) 15 Beav. 357.
(2) Law Rep. 7 H. L. 388.
(3) 10 Ir. Ch. Rep. (N.S.) 14.
(4) Law Rep. 7 H. L. 408.
(5) Law Rep. 9 Ch. 45.

is to say, she gives the income to the tenant for life, and the capital to her children: *Da Costa* v. *Keir* (1); *Galland* v. *Leonard* (2); *Home* v. *Pillans* (3).

In *O'Mahoney* v. *Burdett* (4), and *Ingram* v. *Soutten* (5), the intention to give only a life estate was too clear.

It is inconceivable that the testatrix, having once disposed of the capital of her estate, should alter her intention, and in a particular event hand it over to somebody else.

SIR JAMES BACON, V.C.:—

This is a question which, no doubt, has given a great deal of trouble; but I find that two cases have been decided in which the matter was fully considered, and in which the words were such as I cannot distinguish in meaning and purport from those which I find in the present case. I think it is impossible to distinguish the language in *O'Mahoney* v. *Burdett*, and *Ingram* v. *Soutten*, from that of the present will. In those cases the House of Lords came to the conclusion that the interests which the daughters took were only life interests, with remainder to their children, and I see nothing here to withdraw this case from the authority of the rule here laid down. In *Ingram* v. *Soutten* I find that the decision of Vice-Chancellor *Malins* was the same as that of the House of Lords; the view of the Lords Justices who differed from the Vice-Chancellor was overruled, and the original decision was maintained.

Mr. *Ince* has endeavoured to draw a distinction, on the ground that the testatrix has used the words, "all my real and personal property;" but I cannot think that makes any substantial difference. The decision in *O'Mahoney* v. *Burdett* had reference to a legacy of £1000 stock, and the principle must be the same whether the property consists of land, money, or anything else.

As to the rule in *Edwards* v. *Edwards* (6), I might have followed it; but I cannot do so, inasmuch as, in my opinion, it has been abrogated by the tribunal of last resort in the country, and

(1) 3 Russ. 360.
(2) 1 Sw. 161.
(3) 2 My. & K. 15.
(4) Law Rep. 7 H. L. 388.
(5) Ibid. 408.
(6) 15 Beav. 357.

V.-C. B. 1875 OLIVANT v. WRIGHT.

the sum and substance of the decisions of the House of Lords I take to be, that when there is a gift over in the event of death without issue, that must be held to mean a death without issue at any time, unless a contrary intention appears in the will; and that the introduction of a previous life estate does not alter that principle of construction.

Mr. *Everitt*:—

There remains the question whether, upon the death of a child without issue, following the death of a child leaving issue, the share is to go over in thirds or in fourths.

The VICE-CHANCELLOR said that the question was answered by the express words of the will. The share was to be divided among "the children then living." At the date in question there were three children living, hence the share must go over in thirds.

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The following are minutes of the order:—

Declare that the interests of the children of *Ann Nicholson*, on their death leaving issue, go to their respective children living at their respective deaths:

Declare that the share of the child of *Ann Nicholson* who died without issue devolved upon the three children of *Ann Nicholson* who were living at the death of such child:

Costs to be costs in the cause.

Solicitor: Mr. *Johnston*.

## ASHHURST *v.* MASON.

[1873 A. 83.]

## ASHHURST *v.* FOWLER.

[1873 A. 84.]

V.-C. B.
1875
March 2, 3.

*Contribution—Wrong-doers—Company—Directors—Ultrà Vires—Particeps Criminis.*

Shares of a company were (pursuant to an *ultrà vires* resolution of the board) purchased and transferred into the name of *A.*, a director, in trust for the company :—

*Held*, that *A.* was entitled to contribution from the directors who concurred in the transaction, for calls which he had paid.

A local director present at a meeting in *London*, at which the minutes of the last meeting, when it was resolved to transfer the shares to a trustee for the company, were read and confirmed, though not present until after the commencement of the proceedings, and denying all knowledge of the resolution or transaction :—

*Held* to have been affected with notice, and liable in respect of the transaction.

But another local director, present only at a subsequent meeting, at which the formal minute of approval of a transfer to *A.* was confirmed :—

*Held* not to have been affected with notice, and not liable.

*Land Credit Company of Ireland* v. *Lord Fermoy* (1) distinguished.

THESE were suits by the chairman of the *English Assurance Company*, now in liquidation, for the purpose of recovering contribution from the Defendants, his co-directors, in respect of calls already paid and hereafter to be paid on certain shares transferred into the joint names of the Plaintiff and *J. E. Leyland*, manager of the company, and accepted by them at the request, as it was alleged, of the Defendants.

The suit of *Ashhurst* v. *Mason* related to 250 shares which in 1867, upon the formation of the company, were allotted to *Henry Brockett*, one of the directors, and registered in his name. In April, 1869, *Brockett* resigned his directorship, and in July following he applied to *Leyland*, the manager, and requested him to get him relieved of his 250 shares. It was at first proposed at a meeting of the board held on the 7th of September, 1869, and attended by the Plaintiff, who was chairman of the company, and

(1) Law Rep. 5 Ch. 763.

V.-C. B. 1875 ASHHURST v. MASON. — ASHHURST v. FOWLER.

the Defendant *Mason*, that the 250 shares, on which nothing had been paid, should be transferred into the name of *Leyland* alone, and be held by him as trustee for the company. The minutes of this resolution were read to the board at a meeting of the 14th of September, attended by the Plaintiff, *H. Fowler*, *E. Coventry*, *T. Simpson*, and *J. R. H. Keyworth*, and duly confirmed. At a board meeting held on the 5th of October, 1869, and attended by *Fowler*, *Simpson*, *Coventry*, and the Plaintiff, *Leyland* suggested that it would not be right that the shares should stand solely in his name, and that the Plaintiff's name should be added. The Plaintiff, according to his statement, at first objected, but upon the express arrangement that his co-directors should hold him harmless against all consequences—"see him through it"—he agreed that *Brockett's* 250 shares should be registered in the joint names of himself (the Plaintiff) and *Leyland*. A resolution was accordingly passed that the shares should be transferred into the joint names in trust for the company.

In his cross-examination in Court the Plaintiff adhered to his statement, that when the shares were put into his name he intended that the whole body of directors should hold him harmless, and that there was an expression of general assent on their part.

The shares were accordingly transferred into the names of the Plaintiff and *Leyland* on the 6th of October, 1869, in the form prescribed by the articles of association. The transfer was laid before a meeting of the directors held on the 12th of October, and attended by *Mason*, *Fowler*, and the Plaintiff, and thereat approved. At a meeting held on the 19th of October, attended by *Fowler*, *Coventry*, and the Plaintiff, the minute as to the transfer was confirmed. Fresh certificates were not issued, as the shares, when transferred, were considered as held in trust for the company.

This transfer, and the subsequent purchase by the directors of *Elder's* shares, were transactions *ultrà vires* at the time they were entered into, it being provided by the articles of association (clause 39) that the directors might invest, either temporarily or permanently, all or any of the funds of the company on Government, real, or personal or on other securities or investments being, in the opinion of the directors, of an approved kind, and includ-

ing shares in any other company, but so that (except as thereinbefore authorized) the shares be not in any company in which the liability of the shareholders was not confined to the amount unpaid on their respective shares.

A special resolution was passed on the 11th and confirmed on the 26th of February, 1870 (after the completion of both transactions), that clause 39 be altered by adding at the end thereof the words: "and may from time to time with and out of the funds of the company purchase any shares in the company which may be offered for sale, and at their discretion either to re-sell or hold the same in trust for the company."

The second suit (*Ashhurst* v. *Fowler*) related to 100 shares which were allotted in 1867 to *John Elder*, who died in September, 1869. Mrs. *Elder*, his widow and executrix, being anxious to get rid of these shares, applied to the company to find a purchaser for them, intimating that if this were not done proceedings would be taken to wind up the company. It was ultimately agreed by the directors that *Elder's* estate should be relieved of the 100 shares, and that Mrs. *Elder* should receive £100 for them. As in the case of *Brockett's* 250 shares, *Elder's* 100 shares were transferred into the names of the Plaintiff and *Leyland* in the same way, and upon the same alleged understanding; but the directors present at the meetings of the General Purposes Committee, when these dealings with *Elder's* shares were authorized and confirmed, were not the same as those present at the meetings when *Brockett's* shares were dealt with. The 100 shares were transferred by Mrs. *Elder* in December, 1869, and on the 18th of January, 1870, at a meeting attended by *Fowler*, *T. Simpson*, Sir *J. Rowe*, *E. Coventry*, and the Plaintiff, it was resolved that a cheque for £100 should be drawn and signed and paid to Mrs. *Elder*. The cheque was drawn and signed by *H. Fowler* and the Plaintiff, and countersigned by the manager. The minutes of this meeting were read and confirmed at a meeting of the 25th of January, 1870, attended by *H. Fowler*, *Mason*, *T.* and *J. Simpson*, *E. Coventry*, and the Plaintiff. At a meeting of the 1st of February, 1870, attended by *Fowler*, *Mason*, *E. Coventry*, Sir *J. Rowe*, *Richard Coles*, and the Plaintiff, the transfer was approved; and finally, at a meeting of the 8th of February, 1870, attended by *Fowler*, *Mason*, *Coventry*,

V.-C. B. 1875

ASHHURST v. MASON.

ASHHURST v. FOWLER.

and the Plaintiff, the minutes of the 1st of February were read and confirmed.

On the 2nd of December, 1870, it was resolved to wind up the company voluntarily, and the Plaintiff and two others were soon afterwards appointed liquidators.

The Plaintiff and *Leyland* had been settled on the list of contributories in respect of the 250 and 100 shares, and *Leyland* being, as it was stated, unable to pay, the Plaintiff had had to pay calls to a large amount in respect of both sets of shares, and to repay the £100 paid out of the funds of the company in respect of *Elder's* shares, and was liable to further payments.

Under these circumstances the two bills were filed against the directors and *Leyland*, charging that the Plaintiff and *Leyland* had accepted and held the 250 and 100 shares in trust for and subject to the joint control of the Defendants the directors, and that they became liable to indemnify the Plaintiff and *Leyland* from all losses and damages sustained by them by reason of their acceptance of fresh shares, subject, however, to such contribution as under the circumstances the Plaintiff was himself liable to contribute towards such indemnity. The bills prayed declarations of the liability of the Defendants, other than *Leyland*, to pay or contribute towards payment of the calls and costs already paid by the Plaintiff, and future calls, &c., in equal proportions; and that if any of the Defendants should be unable to pay his full proportion of the contribution the other contributors were liable to make good the same in the like proportions; and that each of the Defendants the directors was liable forthwith to recoup to the Plaintiff the amount already paid by him for calls and costs with interest at 5 per cent., less the Plaintiff's proportionate share of such calls and costs.

By their answer the Defendants disclaimed any trust or any beneficial interest in the 250 or 100 shares, and denied that such shares had been transferred to or were held by the Plaintiff and *Leyland* upon any trust for the directors or any of them, either jointly with the Plaintiff or otherwise, or upon any trust whatever, except a trust or intended trust for the company. They also submitted that not being *cestuis que trust* of the shares, and never having entered into any contract to that effect, they were not

liable in equity or otherwise to indemnify the Plaintiff and *Leyland* against any loss or liability incurred in respect of the shares. They also stated that the Plaintiff had of his own accord associated himself in the transaction, and that so far from having been solicited by them to allow the shares to be transferred into his name, he had himself induced his co-directors to concur in or ratify the transaction.

The directors from whom contribution was sought in the suit of *Ashhurst* v. *Mason* (relating to *Brockett's* shares) were *Mason, Fowler, Coventry, T. Simpson,* Sir *J. Rowe,* and *Keyworth;* in *Ashhurst* v. *Fowler* (relating to *Elder's* shares), *Fowler, Mason, Coventry, T. Simpson,* Sir *J. Rowe, J. Simpson,* and *Coles.*

Sir *J. Rowe,* who was since deceased, had compromised with the Plaintiff, by whom he was now represented for the purposes of contribution. *J. Simpson* did not appear.

*Keyworth,* one of the Defendants to *Ashhurst* v. *Mason,* who had become bankrupt since the institution of the suit, was not one of the ordinary directors, but an *ex officio* member of the board, as chairman of the *Liverpool* Local Committee of Management. By his affidavit, and by the voluntary answer of *Banner,* his trustee in liquidation, it was stated that until after the company went into liquidation, *Keyworth* was quite ignorant of the application by *Brockett* to be relieved of his shares, and also ignorant of the meeting of the 10th of September, 1869, and the resolution alleged to have been then come to and afterwards confirmed; and that he never was a party to or cognisant of any such resolution or confirmation. He was present at the meeting of the board of directors held on the 14th of September, 1869, "but not for the whole time that such meeting continued, for I did not enter the room in which such meeting was held until after the commencement of the proceedings of such meeting." During his presence at that or any other meeting of the board no such resolution (for the transfer of *Brockett's* shares in trust for the company) was reported or confirmed, and he was not privy to or concurring in or cognisant of any such arrangement. He had never ratified or confirmed the transaction with regard to the alleged transfer, or been privy to or concurring in or cognisant of any such alleged ratification or confirmation.

V.-C. B. 1875 ASHHURST v. MASON. ASHHURST v. FOWLER.

*Coles*, a Defendant to *Ashhurst* v. *Fowler*, was a member of the *Southampton* Local Board of Directors, and as such an *ex-officio* member of the *London* Board. He happened to be in *London* on the 1st of February, 1870, and attended the weekly meeting of the board on that day, when, as appeared from the minute book, after reading and confirming the minutes of the board meeting and of the general purposes committee of the 25th of January (which did not refer to the transfer in question)—

"Transfer of 100 shares from the executrix of the late *J. Elder* to *Ashhurst* and *Leyland* approved."

He stated that he never had anything to do with, and had no knowledge whatever of, the transaction.

Mr. *Kay*, Q.C., and Mr. *Locock Webb*, for the Plaintiff:—

A bill will lie to enforce contribution between persons, one of whom has paid that which is the debt of all; and the objection that the Defendants acted upon the advice and representation of the Plaintiff (even if that were the case) would not enable them to throw the whole responsibility upon him: *Lingard* v. *Bromley* (1); *Wright* v. *Hunter* (2); *Wilson* v. *Goodman* (3). The dealings with these shares were no doubt *ultrà vires*, but the Plaintiff is not thereby precluded from suing his co-directors, to compel them to contribute to make good the loss that has arisen, there being no such rule as that a wrongdoer can in no case file a bill: *Baynard* v. *Woolley* (4); or, *à fortiori*, a person who has merely concurred in an act, not illegal but unauthorized, and where the liability does not arise *ex delicto*.

[The VICE-CHANCELLOR referred to the legendary case of a suit by a highwayman against his comrade of the road for a partnership account of his share of the plunder (5).]

In the case of a tort a bill will not lie, but where there has been merely a civil wrong, or as here, an act which was merely *ultrà*

(1) 1 V. & B. 114.
(2) 5 Ves. 792.
(3) 4 Hare, 54.
(4) 20 Beav. 583–584.
(5) The case referred to is that of *John Everet* v. *Joseph Williams*, about 1725: see *Pothier* on Obligations, vol. ii. p. 3; *Lindley* on Partnership, p. 188. It appears that the Plaintiff, or a highwayman of that name, was hanged at *Tyburn*, February 1729–30; the Defendant at *Maidstone* 1735; and the solicitor was convicted of robbery 1735, but reprieved and only transported.

*vires* but not in itself illegal, the Plaintiff's right to relief is not affected. Messrs. *Keyworth* and *Coles* are clearly liable with the other directors, as the transactions in question were done with their knowledge and concurrence, and at all events were brought to their notice; and having acted in the affairs of the company, and attended meetings at which the transfers were resolved upon or confirmed, they cannot escape from the conclusion to be drawn from their acts: *Lefroy* v. *Gore* (1); *Charitable Corporation* v. *Sutton* (2); *Joint Stock Discount Company* v. *Brown* (3). If they did not actively request the Plaintiff and *Leyland* to accept the trust upon which the shares were held, they at least acquiesced in the arrangement, and are bound by it.

Mr. *Bagshawe*, Q.C., and Mr. *F. G. Bagshawe*, for the Defendants *Mason*, *Fowler*, *Coventry*, and *T. Simpson*:—

The Plaintiff is not entitled to relief, as his bill is framed upon the theory of the Plaintiff being a trustee of these shares for the Defendants, his co-directors, and as such entitled to be indemnified by his *cestuis que trust* against any liability that might arise out of the transaction; but he has failed to establish any trust, while the alleged *cestuis que trust* have throughout disclaimed any trust in their favour. In the absence of express contract to that effect, a contract to indemnify the Plaintiff against liability in respect of the shares will not be implied. We have offered to make good the £100 which the Plaintiff has been compelled to repay to the funds of the company in respect of *Elder's* share, and to pay the costs of the suit up to the time of our offer, and we submit that the Plaintiff is not entitled to anything more.

[They cited *Phene* v. *Gillan* (4); *James* v. *May* (5).]

Mr. *Eddis*, Q.C., and Mr. *Blakesley*, for *Keyworth* and *Banner* (*Keyworth's* trustee in liquidation), Defendants to the suit of *Ashhurst* v. *Mason*, contended that no liability attached to *Keyworth*, who, as chairman of the *Liverpool* Board, was a merely *ex-officio* member of the *London* Board, and not one of the regular directors. He did not come into the room where the meeting was

(1) 1 J. & Lat. 571.
(2) 2 Atk. 400.
(3) Law Rep. 8 Eq. 381.
(4) 5 Hare, 1.
(5) Law Rep. 6 H. L. 328.

V.-C. B. 1875 ASHHURST v. MASON. — ASHHURST v. FOWLER.

being held on the 14th of February, 1869, until after the transaction had been agreed upon. He never sanctioned the proceeding, and cannot even be affected with notice of the transaction. As between co-directors there is no such thing as constructive liability. They cited *Joint Stock Discount Company* v. *Brown* (1).

Mr. *Jackson*, Q.C., and Mr. *North*, for *Coles*, a Defendant to *Ashhurst* v. *Fowler*, submitted that no liability was established against him: *Land Credit Company of Ireland* v. *Lord Fermoy* (2).

Mr. *Kay*, in reply:—

It is not necessary for the Plaintiff to establish the existence either of a trust or of a contract. The right of contribution asserted by him is a right founded in the doctrines of equity, "bottomed and fixed on general principles of justice, and does not spring from contract, though contract may qualify it": *Dering* v. *Lord Winchelsea* (3).

The liability in respect of these shares has been incurred by the common act of all the directors, who would each and every one of them be entitled to compel the others to contribute to this common liability; and the right of contribution is not affected by the circumstance that these shares, for which they all became liable as trustees for the company, were, as a matter of convenience, transferred into the names of one of themselves (the Plaintiff), and *Leyland* as their servant or agent. With respect to the liability of *Keyworth* and *Coles*, they attended meetings of the company at which these transactions were confirmed, and cannot, by not having taken care to inform themselves of what was going on, escape from the consequences of their acts as directors: *Joint Stock Discount Company* v. *Brown*.

[The VICE-CHANCELLOR referred to *Land Credit Company of Ireland* v. *Lord Fermoy*.]

In that case Mr. *Munster*, who was exonerated, was not put upon inquiry, and credit was given to his denial of any knowledge of the transactions. It may be admitted that the case against *Coles*

(1) Law Rep. 8 Eq. 381. (2) Law Rep. 5 Ch. 763.
(3) 1 Wh. & T. L. C. 4th Ed. pp. 100, 103.

is not so strong as against *Keyworth*, but we submit that he was put upon inquiry by attending the meeting of the 2nd of February, 1870, and therefore is liable together with the others.

SIR JAMES BACON, V.C.:—

This case is singular, but the principles governing it are, I think, reasonably plain. Taking the case of Mr. *Brockett's* shares first: The gentlemen composing the board were of opinion that to take them and hold them in trust for the company would be a very good thing, and they arrange a plan by which it can be done. The first proposal was that Mr. *Leyland*, the manager, should take these shares into his name, that the company might have the benefit of them. That was afterwards changed by adding the name of Mr. *Ashhurst*, the Plaintiff; and Mr. *Ashhurst* did not object to do that which he and they thought was right at the time. They thought it was beneficial, for the company did not know, as I am very willing to believe, that it was beyond the powers of them as directors, or of the company however represented, to acquire shares. Accordingly, that piece of machinery having been resorted to, and resorted to by persons who counsel it and who act in it, if and when a liability arises, no matter from what cause or by what accident, it would be, in my opinion, against the very first principles of law and justice to say that any of them who have caused this thing to be done should escape from the consequences that ensue. That is really the whole case, and, as alleged upon the bill, it is, I think, sufficiently proved.

It would be out of all reason to suppose that either *Leyland*, who was merely the manager of the company, or *Ashhurst*, who happened to be chairman, should take upon themselves any risks or any consequences personally. It is not their invention, it is not their first suggestion, but it is a common design entertained by several persons, and the means of carrying that design to its accomplishment is that the transfer should be made in these two names. Unless I could say that, in justice, Mr. *Ashhurst* is bound to bear the whole of this burden, because he had imprudently permitted his name to be used, the next consequence must be that they who have procured his name to be used, who have adopted his name to carry into effect their design, must reasonably con-

V.-C. B. 1875 ASHHURST v. MASON. ASHHURST v. FOWLER.

tribute to the loss, since loss has happened. That rests upon universal principles. There can, I apprehend, be no doubt in the world about it. The affidavits of *Leyland* and *Ashhurst* prove in detail the fact that the liability possible, but not then very much contemplated, as I am willing to believe, was present to the minds of *Ashhurst* and of the gentlemen whom he names in his affidavit, and to whom he mentions the subject. He says, "You will stand by me," and they say, readily, "Yes." Without saying the consequences would have been the same, I do not think the case would be determined if that feature were wanting. At deliberate meetings of these directors the plan is suggested in detail, and it is shewn that Mr. *Brockett* was ready to resign his shares, of which he got tired. Whether he paid for them does not appear. It is clear that no money passed. No pecuniary advantage was to result to any of the persons connected with that transaction, and it having been done by the common assent of the gentlemen who were present at the meeting, it is impossible, in my opinion, to resist the conclusion that they are all equally liable to bear any burden that has ensued thereupon.

Mr. *Keyworth* stands in a somewhat different position, no doubt; but, being present at the meeting, and having an opportunity (if he came in so late that he did not hear the previous minutes read and the resolution by which they were confirmed) of looking at the book, which was there upon the table before him, it would be in the highest degree dangerous to permit directors or other persons having the management of companies to say, when any particular incident arises, or there comes to be a pinch upon it, "At that moment my thoughts were elsewhere; I did not hear it; in fact I was thinking of something else." There are no means of testing that: there is the plain evidence afforded by the book that he was there present when the minutes were read. He says in his affidavit, that he was present, but not for the whole time, for he did not enter the room until after the commencement of the proceedings of such meeting. That is a most important statement. Although he may not have been there for the whole time, although he may have entered after the commencement of the proceedings, he might have heard the resolution read. He says, "Neither was at that or any other meeting such resolution reported or con-

firmed." But that is not a contradiction of the written record contained in the books. He says further, "I was never, prior to nor until after the company went into liquidation, cognizant of any determination that the alleged 250 shares, or any other shares, should be transferred into the joint names of the Plaintiff and the manager, instead of into the name of the manager alone." That does not cover or touch the point, because the first resolution was that the transfer should be into the name of the manager alone, and the second, into the names of the Plaintiff, Mr. *Ashhurst*, and the manager. [His Honour, after further reference to *Keyworth's* affidavit, and to his statement that he was ignorant of any such meeting as was alleged to have taken place on the 17th of February, 1869, continued:—] But he was there, and there it is recorded in the book, and proved by the evidence. The report was made, and the resolution was read and confirmed at that meeting.

I was struck at first with the case of *Land Credit Company of Ireland* v. *Lord Fermoy* (1), and I thought it might have a closer application to the present case than I think, on examination, it has; because, as has been truly said, all that was reported there, all that the persons present at the meeting can be bound to take notice of, was, that the executive committee, in the discharge of their duties, had reported to the company that, in the ordinary discharge of its business, cheques had been signed for loans to the secretary and another. There was nothing particular in that. There was no reason why anybody present should object to that; the complaint was that the loans had been improperly made; and if the proposition for the loans to Mr. *Costello* and the other gentlemen named had by the evidence in that case been brought to the attention of Mr. *Munster*, then, according to the decision of Lord *Hatherley*, he would have been fixed. Here, what is said to attract his attention is that the shares were to be taken in trust for the company, and to be put in the names of the two individuals mentioned. If he knew that, I think that he must be taken to have known, or at least the law would hold him to have known, that if any loss ensued upon that, he and the other persons who sanctioned that proceeding would be liable for the

(1) Law Rep. 5 Ch. 763.

V.-C. B.
1875
ASHHURST v. MASON.
ASHHURST v. FOWLER.

loss; and that is the whole of his case. The cross-examination of Mr. *Ashhurst* leaves the evidence exactly as it was before. Mr. *Leyland* has not been cross-examined. Those things upon which I can act with certainty and with more satisfaction than oral depositions are the minute books themselves, and I find the transactions there recorded in a manner which does not admit of a possibility of doubt or dispute. For very good reasons, as they thought—for reasons in respect of which no moral blame can be imputed to them—they considered it expedient that these shares should be dealt with in the manner shewn. They counsel, they resolve upon it; it is done; when done, it is done wrongly; and being done wrongly, a pecuniary liability ensues; and it would be against every principle of justice and reason that the persons who were parties to the transaction should say to the one of them who, by their resolution and direction, is by name only the person under a legal liability, that he should bear that exclusively as between him and themselves.

The case of Mr. *Coles* does, I think, differ in very important particulars from the other. He says—and nobody questions it—that he knew nothing at all about the matter; neither about the payment of the £100 (in respect of *Elder's* shares), nor about the taking the shares or anything else. There is nothing, that I can see, that he is fixed with that would probably put him upon inquiry. He comes in by accident, and finds something recorded as having been done which did not concern him. I think, therefore, that the case against Mr. *Coles* fails, and he must be dismissed with costs. As against the other Defendants, I think the Plaintiff is entitled to the relief which he seeks in both suits.

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MINUTE OF DECREE (*Ashhurst* v. *Mason*):—Upon application of Plaintiff let Defendant *Leyland* be appointed to represent the late Defendant, *Sir J. Rowe*, for the purposes of this suit.

Let Plaintiff pay Defendant *Leyland* his costs of this suit, excluding therefrom the costs of any appearance at the hearing.

Declare that Plaintiff and Defendants *Mason*, *Fowler*, *Coventry*, *T. Simpson*, and Defendant *Keyworth* became jointly and severally liable to contribute to and make good the calls paid, and all further calls, if any, to be paid by Plaintiff on the 250 shares transferred to him and Defendant *Leyland* as in the bill mentioned; and that Defendants *M.*, *F.*, *C.*, and *S.*, and Defendant *L.* as such repre-

sentative as aforesaid, and Defendant *Banner* (as the trustee in liquidation of *Keyworth*, and out of his estate), ought respectively to repay to Plaintiff the respective shares of Defendants *M.*, *F.*, *C.*, *S.*, *R.*, and *K.*, of all such calls, and as to the said calls already paid with interest on such shares respectively at the rate of 4 per cent. per annum from the respective dates of the payment of such calls by Plaintiff until the date of this decree. And it appearing by the affidavit of —— that Plaintiff has already paid in cash or been allowed on account by the liquidators, the sum of £2312 10s. in respect of the said calls in the following sums —— on the following dates ——, Order each of the Defendants *M.*, *F.*, *C.*, and *S.* to pay to Plaintiff within ten days from the service of this decree the sum of £——, being his one-seventh share of the aggregate amount of the several principal sums as paid by Plaintiff, together with £——, being, as appears by the said affidavit, the aggregate amount of interest at 4 per cent. per annum less tax on the said principal sum of £—— from the date of this decree until payment thereof. And Plaintiff is to be at liberty to prove under the liquidation of the Defendant *K.* for the like sum of £——, being his one-seventh share of the said principal sums, and for the sum of £——, being, as appears by the said affidavit, the aggregate amount of interest at 4 per cent., &c., on his one-seventh share of the said principal sums respectively to the 1st October, 1873, being the date of the appointment of Defendant *Banner* as trustee of Defendant *K.*'s liquidation. Order Defendants *M.*, *F.*, *C.*, and *S.*, and Defendant *B.*, to pay the Plaintiff his costs of this suit (including therein such costs as he shall have paid to Defendant *Leyland*), such costs to be taxed by the Taxing Master, who is not to include the costs of the summons referred to in Plaintiff's bill (for removing Plaintiff's name from the list in respect of these shares). Liberty to Plaintiff to apply in Chambers as to payment of such portion of the said sums of £—— for which Plaintiff is to be allowed to prove under the liquidation as the Plaintiff may be unable to recover thereunder, and as to the payment of any subsequent interest in respect of the one-seventh share of the Defendant *K.* Liberty to Plaintiff, in case of his failing to recover from any of the other Defendants the sums hereinbefore ordered to be paid by Defendants respectively for principal and interest as aforesaid, to apply in Chambers, as he may be advised, to obtain contribution towards the payment of such sums by the other Defendants and payment to him of such contributions, and generally, as there may be occasion.

Solicitors: Messrs. *Lawrance, Plews, & Co.*; Messrs. *Parker & Clarke*; Messrs. *Westall, Roberts, & Barlow*; Mr. *F. C. Greenfield.*

V.-C. B.
1875
April 16, 20.

## WALDY *v.* GRAY.

[1873 W. 187.]

*Notice—Solicitor—Fraud—Priority—Purchaser for Value without notice.*

*W.*, the acting trustee of a marriage settlement, duly advanced £2000, part of the trust funds, upon mortgage of real estate, of which he took a conveyance to himself and his co-trustee, and obtained possession of the title-deeds. *C.*, the mortgagor, was a client of *W.*, who was a solicitor. Afterwards *W.* fraudulently handed over all the deeds to *C.* *C.* suppressed the mortgage deeds, and deposited the rest, in March, 1865, with a bank to secure his current account. The manager of the bank requiring a certificate of title, *C.* referred him to *W.*, who signed a certificate, in the manager's handwriting, at the foot of the memorandum of deposit: "I hereby certify that Mr. *C.* has a good title to the above properties," for which the bank paid him a fee. In 1868 *W.* became bankrupt, whereupon the fact of the deposit with the bank was discovered by the co-trustee and the beneficiaries; and the bank were informed of the trustees' claim. In 1869 *C.* died, and the mortgage deeds could not be found. In 1873 *W.* died.

On bill by the beneficiaries and surviving trustee of the settlement against the bank, praying for a declaration that the Plaintiffs were first mortgagees, and for delivery up of the title-deeds:—

*Held*, that by reason of the fraud of *W.* notice of the first mortgage could not be imputed through him to the bank, and that the bank were mortgagees for value without notice of the prior mortgage.

Decree against the bank for foreclosure simply, following *Heath* v. *Crealock* (1), without any order for delivery up of the title-deeds.

Secondary evidence of the missing deeds having been duly made and executed, admitted, and found sufficient.

## Cause.

By the settlement, dated the 1st of May, 1858, executed shortly before the marriage of *Charles Richard William Waldy* and *Laura Bendyshe*, after reciting that a sum of £4000 belonging to *Laura Bendyshe*, and invested on mortgage, had been, together with the securities, assigned to *Thomas Waters* and *Henry Temple Waldy*, it was agreed and declared that *Waters* and *Temple Waldy*, their executors, administrators, and assigns, should stand possessed of the £4000 and interest, in trust, from and after the solemnization of the marriage, "either to permit the same or any part thereof to remain in its then state of investment, or with the

(1) Law Rep. 10 Ch. 22.

consent in writing of the said *Charles Richard William Waldy* and *Laura Waldy*, during their lives, or of the survivor of them during his or her life, and after the death of such survivor then in the discretion of the trustees or trustee for the time being of this settlement, to call in the whole or any part of the said sum of £4000, and to lay out and invest the same in the name or names of the said trustee or trustees in or upon any of the Government stocks or funds of the *United Kingdom*, or on mortgage of freehold, copyhold, or leasehold estates in *England* or *Wales*, and not in *Ireland* or elsewhere (such leasehold estates having not less than 40 years unexpired), and with such consent, or in such discretion as aforesaid, to change the investments from time to time for any others or other of the kind prescribed;" and should hold the fund upon trust during the joint lives of *Laura Waldy* and *Charles Waldy*, to pay the income to *Laura Waldy* to her separate use, without power of anticipation, and after the death of one of them to the survivor for her or his life, and after the death of the survivor, upon trust as to the capital of the fund for the issue of the marriage as therein mentioned, and if no such issue, for *Laura Waldy* absolutely.

Of this settlement, *Waters* was the acting trustee. He was a solicitor, living and practising at *Winchester*. Mr. *Temple Waldy*, the other trustee, lived at *Darlington*, and had also practised as a solicitor.

In about 1859 the mortgage debt of £4000 was paid off by the mortgagor, and the money was received by *Waters*.

In February, 1861, *Waters*, with the consent of Mr. and Mrs. *Charles Waldy*, agreed to lend the sum of £2000, part of the £4000, to *John Cave*, a client of his; and by a deed dated the 28th of February, 1861, and made between *Cave* of the first part, *William Courtney*, a mortgagee of *Cave*, of the second part, and *Waters* and *Temple Waldy* of the third part, in consideration of £2000 paid to *Courtney* as mortgagee, with interest, *Courtney* transferred the mortgage debt of £2000, and *Courtney* and *Cave* granted certain freeholds in *Southgate Street*, *Winchester*, and assigned certain leaseholds in the same street, to *Waters* and *Temple Waldy*, their heirs, executors, administrators, and assigns, by way of mortgage to secure the debt and interest at £5 per cent.;

V.-C. B. 1875 WALDY v. GRAY.

and *Waters* and *Temple Waldy* declared that the debt belonged to them upon a joint account. Shortly afterwards the £2000 was duly paid to *Courtney*, and the title-deeds of the *Southgate Street* property were delivered to *Waters*.

In 1864, *Cave*, by letter dated the 7th of April, proposed to *Waters* that he (*Cave*) should take the title-deeds of the *Southgate Street* property and deposit in exchange an agreement for a lease for ninety-nine years of an estate at *Alum Bay, Freshwater, Isle of Wight*, of which estate *Cave* was under agreement to grant building under-leases. He offered also to deposit with *Waters* two acceptances for £1000, and to undertake to sign an agreement to execute a mortgage of the property for £2000 if required by *Waters* to do so.

In answer, *Waters* wrote on the same day to say he should have no objection to accept the security proposed to be substituted for the title-deeds of the house and garden in *Southgate Street*, upon certain terms as to payment by *Cave* of stamp duties and expenses, and that the agreement for lease should be charged with the payment of the same and of the £2000, until mortgage, which was to be executed by *Cave* whenever *Waters* or his co-trustee should require.

To these terms *Cave* assented; and having thus obtained possession of the title-deeds of the *Southgate Street* property, *Cave*, on or about the 14th of April, took them to the *Winchester* branch of the *London and County Bank*, of which he was a customer, and where his account was then or soon afterwards considerably overdrawn. The manager, *John Keen Youldon*, informed *Cave* of a rule of the bank as to obtaining a solicitor's certificate of title, whereupon *Cave* referred the manager to *Waters*, and the manager on the 14th of April sent the deeds to *Waters*, and asked him to give his certificate and schedule. *Waters* thereupon gave the manager a certificate of title, and received a fee of £2 2*s.*, which sum was paid to him by *Cave's* cheque.

The documents were deposited with the bank on the 16th of April, 1864, and were entered in the "security book" of the bank as being of the estimated value of £2000, and consisted of the title-deeds to the houses and land in *Southgate Street*, and did not comprise either the original mortgage or the transfer of

February, 1861. The mortgage was, in fact, concealed from the bank.

The security books shewed that on the 3rd of March, 1865, the above parcel of deeds was given up, and that a few days afterwards the same deeds, together with a counterpart of a lease of *West Close, Freshwater*, of the estimated value of £1250, were redeposited by *Cave*. On this occasion, as on the former, the mortgage was not disclosed to the bank.

A memorandum signed by *Cave* on this occasion, and witnessed by *Youldon*, dated the 10th of March, 1865, was produced. It was on a printed form, the blanks being filled up in *Youldon's* handwriting. At the foot was the following memorandum written by *Youldon*, and signed by *Waters*:—"I hereby certify that Mr. *John Cave* has a good title to the above properties.—*Thomas Waters.*"

After these transactions the interest on the £2000 was regularly paid to Mrs. *Charles Waldy*, until about 1867, when the payments began to be irregular, and, after inquiries and correspondence, Mr. and Mrs. *Charles Waldy* instructed a solicitor to ask for explanations from *Waters*, but the answers were unsatisfactory; and on the 28th of April, 1868, a bill was filed by Mr. and Mrs. *Charles Waldy* and their children against the trustees.

On the 17th of June, 1868, *Waters* was adjudicated a bankrupt; and thereupon, though at what precise date did not appear, the facts with regard to the proposed substitution of security for the £2000, and the deposit by *Cave* of the deeds with the bank, became known to Mr. and Mrs. *Charles* and Mr. *Temple Waldy*.

On the 29th of October, 1869, *John Cave* died intestate.

In January, 1870, a creditor's suit was instituted, to which *James Farquharson Cave*, the eldest son and heir-at-law of *John Cave*, was made Defendant, and in February, 1870, letters of administration of *John Cave's* estate were granted to *James F. Cave*.

Notices of the claim of the *Waldys* having been, in March, 1870, served on the bank, followed by counter notices by the bank to withdraw such claim, in October, 1871, Mr. *Whitehead*, Mr. and Mrs. *Charles Waldy's* then solicitor, had an interview with Mr. *Collins*, the solicitor of the bank, and the nature of the trustees' claim was stated. A negotiation followed, without success.

V.-C. B. 1875 WALDY v. GRAY.

By a deed of conveyance dated the 3rd of January, 1872, executed in obedience to orders of the Court in the last-mentioned suit, all the interest of the late *John Cave* in the *Southgate Street* property was assigned to trustees for the bank.

In July, 1872, a formal claim on the bank on behalf of the *Waldys*, demanding delivery up of the title-deeds, was refused.

On the 17th of February, 1873, *Thomas Waters* died.

The present bill was filed on the 15th of August, 1873, by Mr. and Mrs. *Charles Waldy* and their children, who were infants, and the trustee *Henry Temple Waldy*, against *Gray*, the registered officer of the bank, alleging that *Cave* induced *Waters* to hand over to him all the deeds upon some promise of giving him some other security in their place, and that *Cave* handed them all, except the mortgage deeds, which he retained, to the bank; that the Plaintiff, *Temple Waldy*, was until recently wholly ignorant that *Waters* had parted with the custody of the deeds, and charged that the deposit gave the bank no title as against the Plaintiffs, and that the bank had, through *Waters*, who acted as their solicitor, or otherwise, notice of the mortgage and of the beneficial interest of the first named Plaintiffs therein.

The bill prayed for an account of what was due for principal and interest, and costs, upon the security of the mortgage of the 28th of February, 1861; for a declaration that the Plaintiffs were entitled to a first mortgage or charge on the hereditaments comprised in the deed of the 28th of February, 1861, in priority to the bank, for the amount which should be so found due, with the costs of the suit; in default of payment, for foreclosure; and that the bank might be ordered to deliver up to the Plaintiff, *Temple Waldy*, the deeds relating to the mortgaged premises in their possession; and for other relief.

The registered officer of the bank by his answer said that, inasmuch as *Waters* became a bankrupt in 1868, when the Plaintiffs ought to have ascertained, and almost certainly did ascertain, the position of their trust estate, and inasmuch as the Plaintiff *Temple Waldy* served the bank with the notice in March, 1870, he did not believe that the Plaintiffs, Mr. and Mrs. *Charles Waldy*, had only recently discovered the facts relating to the deposit. He said that *Youldon*, the manager, did not appear to have con-

sulted Mr. *Collins*, the solicitor of the bank, or any solicitor on behalf of the bank, but appeared to have accepted the certificate of *Cave's* own solicitor, namely, *Waters;* that *Waters* was not the solicitor of the bank, and the bank never paid him any fee or remuneration for advice or business of any kind done by him for them; nor were the bank in any sense his clients. He alleged that the bank were purchasers for value without notice, and were entitled to the benefit of their mortgage; submitted that the Plaintiffs had by their laches lost any title to relief they might otherwise have had; denied that the bank were, or ever had been, in possession of the mortgage deeds; and put the Plaintiffs to strict proof of the alleged deeds.

Amongst the secondary evidence put forward in proof of the missing deeds were drafts of the original mortgage from *Cave* to *Courtney*, dated the 20th of December, 1858, of a further charge dated the 31st of August, 1860, of an agreement in 1860 to allow the money to remain for three years, and of an assignment dated the 29th of August, 1860, from *Waters* to *Cave*, of some part of the property, indorsed on a lease which had been granted to *Waters*.

These were produced by *Charles William Waters*, son of *Thomas Waters*, who was one of the Plaintiffs' witnesses, out of the repositories of his late father. They appeared to be the drafts from which the deeds were engrossed.

The draft of the transfer from *Courtney* and *Cave* to the trustees of the 28th of February, 1861, was proved by Mr. *Whitehead* to have been sent by *Waters* to him, and to have been by him (*Whitehead*) accidentally lost in a railway carriage.

Other evidence were entries in the late Mr. *Waters'* bill book of charges against *Cave*, headed "*Re* Yourself and *Courtney* to *Waldy* and another," in relation to the transfer, and to the obtaining and witnessing of *Courtney's* signature. These entries were proved by *Harry Marman*, a clerk of the late Mr. *Waters*, to have been in the handwriting either of *Robert Harrison Nobbs*, a deceased clerk of *Waters*, or of himself.

Amongst *Waters'* papers was found the following memorandum, in his handwriting, and indorsed on a draft letter, or certificate,

V.-C. B. 1875 WALDY v. GRAY.

with schedule of deeds (being a copy of the usual bank form of memorandum of deposit).

"1864. 14 April to 1 March, 1865.

*Re* Mr. *Cave's* property, *Southgate Street.*

"Schedule of deeds herein with *London and County Bank*, &c.

"Copy my certificate of title, 14 April, 1864. "*T. W.*

"I enclosed to *J. K. Y.* next day, and received my fee. See diary. "*T. W.*

"Deeds and original of this returned to me by *J. K. Y.* Latter cancelled and burnt, and former put with *Waldy's* security.

"*T. W.* 1/3/65."

The diary for the year 1864, above referred to, kept by *Waters*, and found amongst his papers, contained the following entries, under date the 7th of April, 1864:—

"*Waldy's Trust.* Mr. *Cave* proposed to me to exchange his £2000 security for a security on his *Alum Bay* lease and two £1000 acceptances, and which I consented to, the £2000 security getting less and less valuable every day, and I found might not realize, when required, the mortgage security to be prepared as soon as I might get it done. See mem. with papers.—*T. W.* This proposal originated in consequence of Mr. *Cave* requiring advances for carrying out his scheme for building thereon as temporary through *L.* and *Coy.*, and to deposit deeds there.

"By cash of him, my fee as offered and paid 8 Jany.

"*T. W.* £25."

In the same diary, under date the 14th of April, 1864, appeared the following:—"*London and County Bank. Re Cave's Deposits.* Pursuant to your instructions (*pro J. K. Y.*). Perusing deeds left with me herein as to title appearing thereon in Mr. *Cave*, and considering and writing certificate thereof. Copy schedule accompanying, and preparing same, also certificate, &c. Paid same time, by cash, £2 2*s.*"

In another diary kept by *Waters* in 1865, appeared an entry for the 2nd of March:—"*Waldy's Trust.* Deeds returned to me by Mr. *Cave.* Further security to be prepared on completing the security of the *Freshwater* estate under *Cave's Trust.*—*T. W.*"

Under date March 10th appeared the following entries:—

"*J. Cave.* With you *Re W. R.* and *Fisher.* Not satisfied, and in consequence you were cramped in your dealings with *L. and County.* Wished to have title-deeds of the *Southgate Street* property to deposit again, and in lieu to take the agreements, &c. *Re Ward,* and the memorandum of the 7th April, 1864, for it, and the £2000, *Re Waldy* and self, trustees. Entered into calculation of value of *Alum Bay* portion of agreement, shewing value at least of £8000, exclusive of *Totland Bay,* the £8000 one-fourth of the real value. Handed you deeds accordingly, and security for *Waters* and *Waldy,* to be prepared so soon as the lease of *Alum Bay* ready, and also of the trust funds. *Few & Co.* now preparing draft, and you were to have it for approval, and let me know.

"By cash of you as a *douceur* in consideration of my not delaying the exchange until security prepared. Deposit at *L.* and *County* required at once for special purposes . . . . £25."

All the above entries were in *Waters'* handwriting.

An extract from *Cave's* current account in the bank ledger shewed the following items:—"1864. April 15. Certificate title, £2 2*s.* June 8, *Waters,* £25." The ledger for 1865 shewed no entry of an item of £2 2*s.*, or of £25, in favour of *Waters.*

Mr. *Temple Waldy* deposed to his having in the year 1861 seen and read over the deed of the 28th of February, 1861, and also the deed of mortgage from *Cave* to *Courtney;* and that both appeared to be duly executed. In the witness-box he also identified the drafts as those which he saw.

Searches for the mortgage deeds in the late *John Cave's* repositories had been fruitless.

Mr. *Kay,* Q.C., and Mr. *Hadley,* for the Plaintiffs:—

The evidence is conclusive that there was a mortgage; and the facts lead to the presumption, first, that the mortgage deeds were handed over by *Waters* to *Cave*; and, next, that they were by *Cave* destroyed. This is quite sufficient to let in secondary evidence.

As to the claim of the bank, *Waters* could not authorize *Cave,* the mortgagor, to make a larger estate than he (*Cave*) had. *Cave*

V.-C. B. 1875 WALDY v. GRAY.

was party to *Waters'* breach of trust, and could convey only his own equity of redemption.

The case is a hard one on the bank, but it would be harder that we, the beneficiaries, should bear the loss.

The legal estate, being in *Waters*, must prevail over the equitable title of the bank: *Manningford* v. *Toleman* (1).

A case greatly resembling this is *Heath* v. *Crealock* (2), in which the judgment of this branch of the Court was upheld by the Court of Appeal, with the exception that the purchasers for value, without notice of the mortgage, were not ordered to deliver up the deeds in their possession. In other words, *Newton* v. *Newton* (3) was not followed. We ask for the same decree as in *Heath* v. *Crealock*, that is, a decree for foreclosure. The Defendant, probably, does not resist this.

Mr. *Eddis*, Q.C. (Mr. *Davey* with him), for the Defendant:—

We put the Plaintiffs to the strictest proof of the mortgage deeds. If the Plaintiffs' title is sufficiently shewn, we cannot resist a decree for foreclosure.

Mr. *Kay* (in continuation):—

Then the question upon that part of the case is as to the proof of the mortgages and transfer. As to the further relief prayed, the bank employed no solicitor except *Waters*, who was himself the defaulting trustee. They say they did not employ him as their solicitor, but they shew it was their practice always to apply to a solicitor to give them a certificate of title; and in this instance they did apply to *Waters*, who was a solicitor. They cannot escape the imputation of the knowledge which *Waters* had. Their plea of valuable consideration without notice cannot avail them, since they must be held to have had notice through *Waters*: *Atterbury* v. *Wallis* (4). It is this that carries the case beyond *Heath* v. *Crealock*, and justifies the prayer for the delivery up of the title-deeds.

(1) 1 Coll. 670.
(2) Law Rep. 18 Eq. 215; Ibid. 10 Ch. 22.
(3) Law Rep. 6 Eq. 135; Ibid. 4 Ch. 143.
(4) 8 D. M. & G. 454.

The VICE-CHANCELLOR:—What does the delivery up of the title-deeds matter to you, if you get a foreclosure decree?

Mr. *Kay*:—Simply that we are saved the necessity of having recourse to another proceeding. Upon the evidence, the entries made by the deceased clerk of *Waters* are admissible as having been made "in the ordinary course of his professional employment:" *Price* v. *Torrington* (1); *Taylor* on Evidence (2).

As to costs, the bank claim to have the first charge on this property, and if that claim is displaced, the Plaintiffs are entitled to costs against them.

[They also cited *Thompson* v. *Cartwright* (3), *Boursot* v. *Savage* (4), and *Rolland* v. *Hart* (5).]

Mr. *Eddis*, Q.C., and Mr. *Davey*, for the Defendant:—

As to the admissibility of secondary evidence. It is now said the deeds are destroyed, but this was not alleged by the bill. As to the evidence itself, it is clear that the contents of a deed cannot be proved by a copy, unless it be shewn that the copy is accurate: *Taylor* on Evidence (6).

As to the further question, we rely upon the principles as to notice laid down in *Kennedy* v. *Green* (7). We cannot be held to have had notice of this mortgage. Did we employ *Waters?* The evidence shews that he was paid a fee on the first occasion by a cheque drawn by *Cave*. On the second occasion there is no evidence that we paid him anything.

If we did employ *Waters*, it is clear he was committing a fraud. He had no right to change the security without the consent of Mr. and Mrs. *Charles Waldy*. Hence he was committing a breach of trust, and doing so for a bribe. That is fraud within *Kennedy* v. *Green*. Under the 22 & 23 Vict. c. 35 (passed the 13th of August, 1859), concealment of deeds by a vendor is made punishable by fine and imprisonment.

*Atterbury* v. *Wallis* (8) was decided on the principle of *Hewitt*

(1) 1 Salk. 285; 1 Sm. L. C. 290.
(2) 6th Ed. 627.
(3) 33 Beav. 178.
(4) Law Rep. 2 Eq. 134.
(5) Law Rep. 6 Ch. 678.
(6) 6th Ed. 512.
(7) 3 My. & K. 699, 719, 720.
(8) 8 D. M. & G. 454, 466.

V.-C. B. 1875 WALDY v. GRAY.

v. *Loosemore* (1), which was expressly distinguished by Vice-Chancellor *Turner* from *Kennedy* v. *Green* (2), on the ground that in *Hewitt* v. *Loosemore* there was no fraud in the original deposit with the Plaintiff, and no fraud in the mortgage to the Defendant beyond the concealment (if there was concealment) of the prior deed. In the present case we have both fraud and concealment: *Hiern* v. *Mill* (3).

*Boursot* v. *Savage* (4) turned upon circumstances which led the Court to think the purchaser was put upon inquiry; and the solicitor trustee, who himself committed the fraud, acted for the purchaser. If *Waters* had executed a legal mortgage to the bank, concealing the prior mortgage, that would have been *Boursot* v. *Savage*.

In this instance *Waters'* conduct was such as must lead the Court to assume "a probability amounting to moral certainty" that *Waters* did not communicate his knowledge to the bank: *Thompson* v. *Cartwright* (5); *In re European Bank* (6); *Eastham* v. *Wilkinson* (7).

We submit, first, that secondary evidence is not admissible to prove the mortgage; but if the Court should think so, and that the evidence is sufficient, we claim to be purchasers for value without notice. In any case the utmost that can be decreed against us is the relief which was ordered in *Heath* v. *Crealock* (8).

The fair result of *Youldon's* evidence is, that the bank in this instance took the opinion of *Waters*, not as their solicitor, but as the solicitor of *Cave*, hence that *Waters* was not the solicitor of the bank within the meaning of the rule.

The result of the cases no doubt is, that the mere suppression of a deed is not such fraud as will bring the case within *Kennedy* v. *Green*. But here, just as in *Kennedy* v. *Green*, we have, first, a fraud committed by *Waters* against the *Waldys* in handing over the deeds to *Cave;* and then, subsequently, a concealment of the fraud from us, when *Waters* certified that *Cave* had a good title.

As to costs, there is no authority for saying that a second mort-

(1) 9 Hare, 449, 455.
(2) 3 My. & K. 699.
(3) 13 Ves. 114.
(4) Law Rep. 2 Eq. 134.
(5) 33 Beav. 178; 2 D. J. & S. 10.
(6) Law Rep. 5 Ch. 358.
(7) 33 L. T. 234.
(8) Law Rep. 10 Ch. 22.

15 Sc. Gen. Jur. 1940, 1215.

gagee who calls upon the Plaintiff, a first mortgagee, to prove his security, is to be mulcted in costs.

Mr. *Kay*, in reply:—

*Waters'* breach of trust consisted in his handing the deeds to *Cave*. That is not fraud within *Kennedy* v. *Green* (1), and mere suppression of the deeds is not enough. Hence the bank is fixed with notice; and we are entitled to delivery up of the title-deeds.

SIR JAMES BACON, V.C.:—

The first question argued by counsel for the Defendant would have put an end to the suit if I had decided it in their favour. It is said that the Plaintiffs could not, according to the rules of evidence, be entitled to adduce secondary evidence of the missing deeds; and in that respect the case deserves close and particular attention.

That there was a mortgage for £2000 in the aggregate, that the mortgage was formerly vested in *Courtney*, and that it was transferred by *Courtney* upon the payment to him of the £2000 by *Waters*, is I think very distinctly proved. The evidence of Mr. *Temple Waldy* must be received here, as it would be received anywhere, as evidence of the fact, that, at the time when he was directly interested in seeing that the trust money was being properly secured, a deed was produced, perused, and examined by him, and he, being a professional man, satisfied himself that there was in existence, lying before him and read by him, the mortgage upon which the Plaintiffs rely.

That deed is not forthcoming; and the history of the cause shews plainly why it is not forthcoming. The bill of costs which the Defendant has referred to shews, I think, sufficiently that that deed and other deeds were by *Waters* handed over to *Cave*, and so the deed came into the possession of *Cave*. It is not forthcoming now. Search has been made, and inquiries have been made, sufficient I think for the purpose, from the son and representative of *Cave*, and the result has been that no such deed is to be found. The witness who says that he made those inquiries has been cross-examined, and no question was put to him

(1) 3 My. & K. 699.

V.-C. B. 1875 WALDY v. GRAY.

for the purpose of shewing that his searches or his inquiries had been insufficient, or that they had had any other result than that which he states. Mr. *Eddis* says very truly, it was not for him by cross-examination to supply any deficiency in the Plaintiff's evidence. I quite agree with that; but I say that his objection being that the searches were not upon the evidence shewn to be sufficient, I think he cannot rely upon any such objection, since he has not availed himself of the opportunity which he had of proving, as he might have proved, by the cross-examination of the witness, that the searches had been insufficient. I must take it, therefore, that the searches have been sufficient.

Then it is said, very truly, that there are no degrees in secondary evidence, and that the secondary evidence mainly relied on by the Plaintiffs consists of drafts of deeds (with one exception where the draft has been lost), and that, although you may prove the contents of a deed by a copy, yet you must shew that the copy was truly made, that it is not a mere copy of a copy, and further, that it is the best evidence which the nature of the case furnishes upon that particular topic.

Now it is not suggested that any copy of the deeds was ever made. The drafts are not tendered as copies of the deeds. The drafts are brought out of the repositories of *Waters*, who prepared the deeds; they are there standing as records, to a certain extent, of the contents of the deeds. The indorsements upon them shew that the deeds were engrossed from those identical drafts, and that they were duly stamped and duly executed. In my opinion, this is perfectly good secondary evidence.

The observation I have already made, that the testimony of Mr. *Temple Waldy* is perfectly good evidence of the existence of the mortgage deeds and of their contents, must, I think, apply to that respecting the other draft which was unfortunately lost in the railway carriage. Mr. *Eddis* objects that all the witness, Mr. *Whitehead*, says is, that Mr. *Waters* sent him a paper which he (*Waters*) said was the draft. I do not understand the evidence so; but then there is other evidence in Mr. *Waters*' bill of costs which has been referred to, and in the affidavit of his clerk living, and the memorandum of his clerk dead, made in the regular course of his business, which satisfies me that of that draft there is good

secondary evidence—evidence upon which the Court can with the most perfect safety act, and upon which I cannot persuade myself that a jury would for one moment hesitate in finding the facts to be as they are alleged by the Plaintiffs—I mean those facts which constitute the Plaintiffs the persons beneficially entitled to the mortgages in question. It was for these reasons I did not ask Mr. *Kay* to reply upon that part of the case.

The other part of the case presents much greater difficulties. In all cases of constructive or imputed notice the inquiry is a difficult and delicate one, and is to be pursued with the utmost caution. But *Kennedy* v. *Green* (1) lays down a principle which must commend itself to everybody's sense of justice. If a professional man is employed in a transaction, the law imputes to the client who employs him the knowledge which the solicitor so employed possesses. But then that is subject to this plain qualification: If the disclosure of that fact of which knowledge is sought to be fixed upon the client would have imputed fraud to the solicitor, it is not to be presumed that the solicitor did make disclosure of that fact. Now a more gross, plain, palpable fraud than that which was perpetrated by *Waters* cannot well be conceived. *Waters* was a trustee with the limited powers which a trustee has; he was bound to discharge the duties which are incumbent upon a trustee. Those duties he violates. He hands over the deeds to *Cave*, as I think is plainly proved. He does that for a consideration paid to him—for a sum of £25—I speak only of the last occasion, though there was a similar sum paid to him upon the first—in direct violation of his duty, by a transaction in which he incurred direct personal liability, and for which he was liable to be punished. Whether he was liable to be punished under the statute or not it is not necessary to inquire, but that this Court has power to punish a solicitor trustee who has so misconducted himself, cannot for a moment be questioned. That it was a plain, palpable fraud committed by *Waters* is, I think, not to be disputed.

Now, I take the law to be plain that, although a mere suppression of a deed will not, according to the case of *Atterbury* v. *Wallis* (2), of itself bring with it the same consequences as other fraud, yet

(1) 3 My. & K. 699, 719.

(2) 8 D. M. & G. 484.

V.-C. B. 1875 WALDY v. GRAY.

the suppression of a material personal fact—the suppression of a thing done by a man in direct violation of his duty as trustee—is an act which must relieve a Defendant of all imputed knowledge of the transaction upon any theory of notice through a solicitor. I should have said this if there had not been abundant authorities to justify me in saying so. I take it to be very clearly established that if a person employed as a solicitor has done things which if disclosed would prevent the perfection of the security on which he is engaged, which would shew that a good title does not exist to that which he is the instrument of conveying to the purchaser, it is not to be expected or inferred that he would communicate what he has done to his client. To presume that, to clients who were about to lend their money upon an equitable mortgage by deposit of title-deeds, he would say, "I have a legal mortgage of my own upon this property, which I can come and enforce against you at any time, and deprive you of the benefit of the transaction on which I am employed by you," would be monstrous, and is directly against authority.

If the case, therefore, stood on that alone, I should say that no knowledge is to be imputed to this Defendant, and that the bank are entitled to rank as second, not as first, mortgagees of this property.

The memorandum of deposit which has been referred to does not, I think, in any proper view of it, bear the construction which has been suggested. The bank are in the habit of lending their money upon the deposit of title-deeds. The course of their business does not enable them to exercise discretion sufficient to know whether the title-deeds tendered to them do or do not shew a title in the person desirous of borrowing. For the purpose of ascertaining this, they resort to a professional man to tell them whether, a list of the deeds being laid before him and the deeds themselves being shewn to him at the same time, those deeds shew a good title in the intended borrower. That is the sole function which he is called upon to discharge; and that is the duty which, as between the bank and *Waters*, should have been discharged by *Waters*. His certificate is, "I hereby certify that Mr. *John Cave* has a good title to the above properties." That can only be read as meaning, "Having read

these title-deeds, I say that they shew a good title." *Waters*, when he signed that, knew that, although these deeds did so far as they were concerned shew a good title, *Cave* had no legal estate—only an equity of redemption—in the property. I think, therefore, upon the principle of *Kennedy* v. *Green* (1) and the other cases, and not disregarding *Atterbury* v. *Wallis* (2), a very different case from this, that the Defendant has a right to say that the bank are purchasers of such interest as they have acquired, for valuable consideration and without notice.

The only other point to be observed upon is the question of costs. Now, I cannot say that the bank, assailed as they are by this suit, and finding a claim of a mortgage paramount to theirs made against them, without evidence which they were bound to receive and act upon being adduced to shew them that that was so—for it cannot be said that they were bound, until the hearing of this cause, to accept such evidence as was shewn to them—are not entitled to say, "We have got, under these circumstances, a charge upon this property; we say our charge is prior to that of any one else; and if you, the Plaintiffs, say the contrary, we put you to the strict proof of it." This I think they have a right to say; this is all they have said, and in saying this they have not, in my opinion, gone a step beyond their right. The Plaintiffs, unfortunately, in this case are likely, I understand, to lose a very considerable part of the money which was lent upon the security of this property. It is a very hard case upon the Plaintiffs, but it is not a less hard case upon the Defendant—it is a much harder case upon the Defendant. And when it is stated that the property, if sold, will not indemnify the Plaintiffs or pay them back their money and the costs of this suit, all I can say is that I regret this very much; but it does not alter the rights of the parties. If a man, with a title not easily proved, brings his opponent, whose title is very easily proved, into Court, and says, "I insist upon having a paramount title over you," the Defendant may in all reason and propriety, and with the utmost fairness (and I find no want of fairness in any part of this case, on the part either of the Plaintiffs or of the Defendant), say, "Before I yield to your

(1) 3 My. & K. 699. (2) 8 D. M. & G. 454.

V.-C. B. 1875 WALDY v. GRAY.

demand, you must prove your title, and have a decree made against me, establishing the right which you claim, but which I do not admit, and cannot take upon myself to decide."

I think, therefore, all that can be done is to make a decree establishing the title of the Plaintiffs, as first mortgagees of the property in question. I cannot, after the decision in *Heath* v. *Crealock* (1), make, as I made in that case, an order for the delivery up of the title-deeds. The Lords Justices have decided that such an order cannot be made in a case such as this turns out, in my judgment, to be—that is to say, a purchase for valuable consideration without notice.

Therefore the only decree that can be made will be a declaration that the Plaintiffs are first mortgagees, and then the ordinary foreclosure decree.

Mr. *Kay*:—Of course we shall be entitled to the rents that have been received by arrangement.

Mr. *Eddis*:—That will be going beyond *Heath* v. *Crealock*.

The VICE-CHANCELLOR was of opinion that, as the rents had by arrangement been received by the bank, the Plaintiffs were entitled to those rents from the date of the arrangement.

Solicitors for the Plaintiffs: Messrs. *Norris, Allens, & Carter*, agents for Mr. *Francis Simonds, Southampton.*

Solicitors for the Defendant: Messrs. *Stevens, Wilkinson, & Harries*, agents for Mr. *Collins, Winchester.*

(1) Law Rep. 10 Ch. 22.

## TALBOT *v.* JEVERS.

V.-C. B.
1875
June 1.

[1866 T. 142.]

*Will—Construction—Lawful Period of Accumulation—Thellusson Act* (39 & 40 *Geo.* 3, *c.* 98)*—Felony—Mixed Fund—Intestacy.*

Testator devised a landed estate, and bequeathed all his personalty to a trustee, upon trust so to vest his real estate in, and cause his personal estate to be placed under the control of, the Court of Chancery, as that the Court might administer the same; and then bequeathed several annuities to be paid out of the rents and profits of the realty and the proceeds of the personalty, and directed that, subject to the payment of the annuities, the rents, income, and produce of the trust estate should be accumulated at compound interest until the decease of the last surviving annuitant, "or during such portion of such surviving annuitant's life as the rules of law will permit," and on the decease of the last surviving annuitant the whole of the trust estate funds and accumulations to be applied by the Court in the purchase of freehold land, to be conveyed to testator's nephew, *G. G.*, and his heirs:—

*Held*, that, of the rents of the realty, and the income of the personalty, which would accrue during the interval (if any) which should elapse after the expiration of twenty-one years from the death of the testator, and the death of the surviving annuitant, there was an intestacy:

*Held*, further, that *G. G.* was not entitled, during the life of the surviving annuitant, to ask for payment of the fund to himself, subject to provision being made for the annuities.

The Court refused to make any order at present, except to pay the annuities and continue the accumulations.

## FURTHER CONSIDERATION.

*Stirling Freeman Glover* died on the 3rd of April, 1866, having by will, dated the 4th of October, 1864, appointed *Edward Fitzroy Talbot* executor thereof.

After a devise of specific real estate, called *Summer Hill*, and *Lackaroo*, in the county of *Cork*, to his nephew, *John Power Glover*, and his heirs for ever, the testator devised and bequeathed a landed estate and hereditaments in the county of *Cork*, called *Conrogh-clon-bro*, to *Edward Talbot* and his heirs upon trust as therein mentioned, and he gave and bequeathed to *Edward Talbot* all his personal estate and effects upon trust "so to vest my real or landed estate in the High Court of Chancery in *England* that the same may be under the sole control and protection of the said Court, and that the rents and profits of the said estate

V.-C. B. 1875 TALBOT v. JEVERS.

may be received and administered by the said Court in the same way as is hereafter expressed with reference to my personal property; and upon trust, as regards my said personal estate, property, and effects, to cause the same to be placed under the like control and direction of the said Court; and for carrying into effect such trusts as regards both my said real and personal estate and effects, I hereby direct my said trustee and executor, the said *Edward Talbot*, without any delay after my decease, to institute a suit in the said Court of Chancery, and to obtain an order or decree of the said Court for carrying out my wishes with regard to the trust property and funds so to be vested and placed in and under the direction and administration of the said Court as hereinafter explained."

Testator then directed that several life annuities should be paid "out of the rents and profits of my landed estates, and out of the dividends, interest, and produce of all my said personal property and effects." He then declared that the annuitants should "have no power in any way to sell, encumber, or anticipate their several annuities," and in case any of them should do so, from and immediately after any such sale or anticipation the annuities should cease and become void, and the amount of every such annuity which might so cease should sink into and form part of his personal estate. He then proceeded as follows: "And I hereby further declare my will to be that, subject to the payment of the said several annuities, I wish the rent, income, and produce of the said trust estate, property, and funds, to be accumulated in the way of compound interest until the decease of the last survivor of the said several annuitants, or during such portion of such surviving annuitant's life as the rules of law will permit, and on the decease of the last survivor of the said several annuitants, I wish and direct that all the said trust estate, funds, and accumulations thereof, shall be applied by the Court of Chancery in the purchase of freehold estate or land in *Great Britain* or *Ireland* to the full amount and value of such trust estate, funds, and the accumulations thereof, and to convey and assure such freehold estate or land when purchased to my nephew, *George Glover*, the youngest son of my late brother *George*, and to his heirs for ever."

The bill was filed on the 1st of December, 1866, and was amended

shortly afterwards. As amended, it was by *Edward Fitzroy Talbot*, the trustee, against several of the annuitants, and *George Glover*, when he should come within the jurisdiction, for administration of the trusts of the will, so far as the same were legally capable of taking effect.

By the Chief Clerk's certificate, dated in June, 1871, it was found that the real estate of which the testator died seised consisted of the *Summer Hill* and *Lackaroo* estate, and of a fee farm rent of £1 7*s.* 9*d.* an acre (quit rent and Crown rent excepted), arising out of the lands, containing about seventy-two acres, of *Conoughllabroe*, in the county of *Cork*, with a reservation of rights of mining, mines and minerals, and rights of sporting.

It was also found that on the 22nd of October, 1867, *George Glover*, the testator's nephew, the devisee mentioned in the will, was convicted of felony at *Singapore*, and sentenced to penal servitude for four years.

One of the annuitants was still under age. To the annuitants who survived the testator, five in number, the annuities were regularly paid, and had since the 25th of July, 1871, been continued to be paid, under order of the Court.

Mr. *Hamilton Humphreys*, for the Plaintiff.

Mr. *Edward Thurstan Holland*, for the next of kin:—

The bequest to *George Glover* does not take effect until the death of the survivor of the annuitants, and there being a trust to accumulate in the mean time, a question arises under the *Thellusson Act* (39 & 40 Geo. 3, c. 98). The Act provides (sect. 1) that no person shall settle or dispose of any real or personal property so that the rents, profits, or produce thereof shall be accumulated for any longer term than the life of the grantor, or twenty-one years from his death, or during the minority of any person who shall be *in esse* at his death. Here the annuitants, or some of them, may, and probably will, survive the period of twenty-one years. The gift of all accumulations during the period by which the surviving annuitant may outlive the twenty-one years is, therefore, void: *Eyre* v. *Marsden* (1).

(1) 2 Keen, 564.

V.-C. B. 1875 TALBOT v. JEVERS.

This is a gift of residue, and the undisposed of income from personalty, if any, during the period above mentioned belongs to the next of kin: *Oddie* v. *Brown* (1); *Green* v. *Gascoigne* (2).

The accumulations, therefore, must be stopped at the end of twenty-one years if any annuitant should then be living.

If any claim to present payment should be made, it may be observed that in *Harbin* v. *Masterman* (3) the Court refused to stop the accumulations on the ground that at the period of distribution different individuals might become interested in the fund to those who were then entitled.

Mr. *Fooks*, Q.C., and Mr. *W. W. Cooper*, for *George Glover* :—

In this case no accumulations have been directed beyond the limits assigned by the law. The will says expressly, "during such portion of such surviving annuitant's life as the rules of law will permit."

But if there had been no such limitation, the Court cannot possibly now decide the question between the legal representatives and the Crown. This is a rent of about £60 a year; and questions of contribution may arise—questions of how the income is to be dealt with during the life of the last surviving annuitant, and others. Besides, there is a trust for administration by the Court of Chancery which the Court will think ought to be executed; and *George Glover* may die.

If the Court should undertake to decide now, we say that the whole fund has been impressed with the character of real estate, and hence is not forfeitable at all—that being money directed to be laid out in the purchase of land, it is protected from being forfeited as personal estate: *Lewin* on Trusts (4), referring to *Re Harrop's Estate* (5).

If Mr. *Glover* were to die to-morrow, this fund would go to his heir-at-law. Hence, in any event, the Crown is not entitled.

Mr. *Coltman*, for the heir-at-law :—

It is necessary that the Court should come to some decision as

(1) 4 De G. & J. 179. (3) Law Rep. 12 Eq. 559.
(2) 4 D. J. & S. 565. (4) 6th Ed. p. 668.
(5) 3 Drew. 726.

to whether or not there is a partial intestacy, in order that directions may be given as to how the accounts are to be kept.

There is a clear intestacy of the income during the interval (if any) after the expiration of the twenty-one years.

There is also an intestacy as to the *corpus* of the *Conrogh-clon-bro* estate. It is given in trust, but no trust is declared, except a trust of the income; and the final devise is a devise only of the land "when purchased," which could not include the above-named estate.

Mr. *W. Joyce*, for an annuitant.

Mr. *Hemming* for the Crown:—

What would have been the state of things if Mr. *Glover* had not been convicted? The cases cited on behalf of the next of kin were on the question of what was to be done with accumulations that had been set free by the *Thellusson Act*. Here there is nothing of the sort, and those cases are inapplicable. Having directed accumulation during the lawful period, and no further, the testator proceeds to devise and bequeath all the trust estate. If the trust estate had been all realty, that devise would not have carried the undisposed of intermediate income; if it had been all personalty, it would have carried the intermediate income; being a mixed fund, the gift carries the intermediate income of both, as if all had been personalty: *Genery* v. *Fitzgerald* (1). Therefore, both during the period of accumulation and afterwards, the income falls into the residuary gift.

That being so, *Glover* would have been entitled at any time to have the accumulations stopped, and so much of the fund, whether capital or income, as was not wanted to secure the annuities paid to him immediately. *Saunders* v. *Vautier* (2); *Josselyn* v. *Josselyn* (3).

This is, in fact, only one branch of the general rule that a legatee of full age is entitled to take the property left to him as it stands, notwithstanding that the testator has directed that it shall be laid out for his benefit in a particular way, it may be by accumulations or by investing in land, or by purchasing a commission, or otherwise.

(1) Jac. 468, 470.

(2) 4 Beav. 115, 118; Cr. & P. 240.

(3) 9 Sim. 63.

V.-C. B. 1875 TALBOT v. JEVERS.

In *Harbin* v. *Masterman* (1) this was in fact acknowledged, and all that *Wickens*, V.C., decided was, that whereas an ordinary legatee could have come and asked that the accumulations might be stopped, there was a difference where the legatee was a charity. And that was a case in which the period of accumulations exceeded or might exceed the time limited by the Act.

Whether the Crown is entitled or not depends upon the state of the fund while the sentence was in force. If a testator gives real estate to *A.* for life, and then upon trust to sell and pay the proceeds to *B.*, *B.*, if he endures his sentence during the life of *A.*, will not incur forfeiture. The Court looks at the state of the fund at the time when the sentence is in force, not at any conversion directed by the will: *In re Thompson's Trusts* (2). And the converse holds where the trust is to purchase real estate. It does not matter that the felon's interest is reversionary; the question is, in what state—real or personal—is the fund at the time. Now here the personalty fund has never been laid out in the purchase of realty, and for purposes of forfeiture it must be treated as personalty.

*Re Harrop's Estate* (3) has no application. There the property came to the convict as land, under the express provision of a statute.

The Crown has no title to the realty, except that the fee farm rent and the arrears and accumulations of rent during the sentence may be claimed as personalty.

It will be necessary first to apportion the annuities.

SIR JAMES BACON, V.C.:—

In order to sustain the argument on behalf of the Crown it is necessary to hold that *George Glover*, but for the felony, could have come now and have asked for the payment to him of this fund, after provision had been made for the annuities. I cannot conceive that *George Glover* has, or could have had, any such right. The will is reasonably plain. The testator gives a landed estate, and the whole of his personalty, upon trust to place the same under the control and administration of the Court of Chan-

(1) Law Rep. 12 Eq. 559. (2) 22 Beav. 506. (3) 3 Drew. 726.

cery, and directs the payment of certain annuities out of the rents and profits and annual income of both funds. The surplus income he directs to be accumulated during such portion of the surviving annuitant's life, "as the rules of law will permit;" and then there is a direction that all the trust funds and the accumulations shall be laid out in freehold estate or land, which, when purchased, is to be conveyed to *George Glover* and his heirs. There is no *constat* that when the termination of the period of accumulation arrives, or that before such termination, the gift to the heirs of *George Glover* will be capable of taking effect.

With reference to the cases which have been cited by Mr. *Holland*, there is this distinction, that they are cases where no rights are in question or dispute, and hence they have no application to the present.

Here the testator's object was to provide that, for a period such as the law allows, the rents might be accumulated, and that with the accumulations, added to the fund, a real estate might be purchased, which should be conveyed to *George Glover*.

If the period of twenty-one years should expire during the life of the surviving annuitant, my opinion is that, as to the rents and profits during that period, there is an intestacy, and that the rents of the real estate belong to the heir-at-law, and the income of the personalty to the next of kin.

I do not hesitate to say that this, in my opinion, is the true construction of the will, but I can make no order, because, the testator having given a direction—which he had a perfect right to do—that the administration of his estate should be under the control of the Court of Chancery, it is not my desire to frustrate his intention, or to prevent the Court of Chancery from exercising that superintendence over the estate which he desired it should exercise.

My opinion is that, for so much time as the surviving annuitant shall outlive the period of twenty-one years, there is an intestacy.

The only order will be to continue the accumulation, and pay the annuities out of the general fund; all costs to come out of the fund.

Solicitors: Mr. *Gant;* Mr. *Tripp;* Messrs. *Raven & Hare.*

V.-C. H.
1875
*May* 4, 5.

## WATKINS *v.* NASH.

[1873 W. 190.]

*Escrow—Delivery to Stranger—Delivery to Grantee's Solicitor.*

The delivery to the solicitor of the grantee of an instrument executed by the grantor will not convert the instrument from an escrow into a deed, provided the delivery is of a character negativing its being a delivery to the grantee.

The definition of an escrow in *Sheppard's* Touchstone (1) explained.

THIS was a foreclosure suit. According to the judgment of the Vice-Chancellor, the evidence in the case, which was somewhat conflicting, resulted in establishing the following facts :—

The Plaintiffs, *Benjamin Watkins* and *William Hutcheson Collins*, were the trustees of the settlement executed on the marriage of Mr. *John Henry Skyrme*, a solicitor, practising at *Ross*, in the county of *Hereford*, under which instrument the wife took the first life interest in the settled property.

By an indenture, dated the 29th of November, 1866, the Defendant, *Francis Nash*, conveyed to the Plaintiffs, their heirs and assigns, certain freehold hereditaments in the *Forest of Dean*, by way of mortgage, for securing the repayment of a sum of £2000, part of their trust fund, which the Plaintiffs then advanced to *Nash*.

In the year 1869, *Skyrme*, who was *Nash's* solicitor, informed the Plaintiffs that *Nash* was desirous of paying off the mortgage debt, and of taking a reconveyance to himself, and a reconveyance was accordingly prepared, and was engrossed on the indenture of mortgage.

*Collins*, who was a solicitor, resided at *Ross*, and *Watkins*, who was a farmer, resided nine miles from *Ross*, and only attended that town for business purposes.

On the 23rd of December, 1869, *Skyrme*, in company with *Watkins*, called upon *Collins* at his office in *Ross*, and at *Skyrme's* request, and upon his representation that it would facilitate the

(1) Pages 58, 59.

speedy completion of the matter, *Watkins* then and there executed the reconveyance as an escrow conditional on the payment of the mortgage debt, and left it with *Collins*.

Nothing further was done in the matter until the 18th of April, 1872, when *Skyrme*, in company with *Watkins*, called on *Collins*, and told him that *Nash*, the mortgagor, was about to sell the mortgaged property, and intended to pay off the mortgage debt in the then following week, and *Skyrme* then requested *Collins* to execute the reconveyance so as to enable him (*Skyrme*) to take it to *London* to be stamped, and by making an affidavit that the matter had until then been unsettled to save the penalty payable on the non-stamping of the instrument. *Collins* upon this request executed the reconveyance and handed it to *Skyrme*, taking from him an undertaking in writing to return it in two days, which undertaking contained a statement to the effect that the deed had been executed as an escrow, and upon the faith of an undertaking that the business should be forthwith settled.

The reconveyance was returned by *Skyrme* to the Plaintiffs a few days afterwards; the mortgage debt was, however, never paid to the Plaintiffs. On the 27th of April, 1873, *Skyrme* died, and on the 3rd of June, 1873, the Plaintiffs gave *Nash* notice to pay off the mortgage debt and interest. It was then discovered that *Skyrme* had fraudulently appropriated the money raised by *Nash* to pay off the mortgage debt, leaving *Nash* under the impression that it had been paid off, and the property reconveyed in December, 1869; and although no interest had been claimed by the Plaintiffs between December, 1869, and June, 1873, this was accounted for by the fact that *Skyrme* had continued up to the time of his death to be the solicitor of *Nash*, the mortgagor; and by the fact that, being the husband of the person entitled to the first life interest, *Skyrme* had always been permitted by the Plaintiffs, the mortgagees, to receive the interest from *Nash* on behalf of his wife. The written undertaking given by *Skyrme* to the Plaintiffs upon the execution of the deed by *Collins* had been given up to *Skyrme* when he returned the reconveyance, and was not forthcoming.

The only question in the suit calling for a report was, whether, under the circumstances, the reconveyance was an escrow or not.

V.-C. H. 1875 WATKINS v. NASH.

Mr. *W. Pearson*, Q.C., and Mr. *A. Thomson*, for the Plaintiffs:—

An escrow is an instrument delivered upon condition: if the condition is performed, the instrument becomes an absolute deed; till then, it continues an escrow; and if the condition is never performed, it never becomes a complete deed at all: *Johnson* v. *Baker* (1); *Murray* v. *Earl of Stair* (2); *Smith* on Contracts (3). An express declaration by the party delivering the instrument that he delivers it as an escrow, obviates all question as to his intention; but such express declaration is not essential if that conclusion is to be drawn from the circumstances: *Furness* v. *Meek* (4). And this has been held to apply to a case where the instrument, after being executed by one party, was sent to the agent of the other party: *Millership* v. *Brookes* (5). In the present case the reconveyance was executed by *Watkins* on the 23rd of December, 1869, not as a complete deed, either to pass his undivided moiety of the mortgaged property or to operate as a discharge of the mortgaged debt, but purely as an escrow, to take effect as a deed only upon payment of the mortgage debt, and not to be handed over until that was paid. The execution by *Collins* on the 18th of April, 1872, was of the same incomplete character; and although the instrument was handed over, after he had executed it, to a person who was the mortgagor's solicitor, it was handed to him on the faith of his representations, for a special purpose, upon an express written undertaking that it was to operate as an escrow; and it was afterwards delivered back to the Plaintiffs. Under these circumstances the instrument was an escrow, and the legal estate remains in the mortgagees.

Mr. *Dickinson*, Q.C., and Mr. *Cozens-Hardy* (Mr. *J. O. Griffits* with them), for Mr. *Nash*, the mortgagor:—

Here the deed was signed, sealed, and delivered on two separate occasions, and the receipt for the mortgage money was duly indorsed and signed. On the first occasion the deed was delivered by one conveying party to the other conveying party; on the second occasion it was delivered by the second conveying party to the solicitor of

(1) 4 B. & A. 440.
(2) 2 B. & C. 82.
(3) 6th Ed. pp. 8–11.
(4) 27 L. J. (Ex.) 34.
(5) 5 H. & N. 797.

the grantee. It was laid down in *Sheppard's* Touchstone (1) that "the delivery of a deed as an escrow is where one doth make and seal a deed and deliver it unto a stranger until certain conditions be performed;" but, to remain an escrow, it is essential "that the deed be delivered to one that is a stranger to it, and not to the party himself to whom it is made." On neither occasion was this rule complied with. Further, the delivery to the grantee's solicitor was the same thing as a delivery to the grantee himself; and if so, an express declaration by the party delivering that he intended the delivery to be conditional would not prevent the deed from becoming absolute, for it is impossible by words to get rid of the legal operation of the delivery: *Smith* on Contracts (2), citing *Holford* v. *Parker* (3) and *Coke* upon *Littleton* (4). Moreover, the mortgagees, having executed a solemn instrument reconveying this property, and having signed receipts for the mortgage-money, cannot say that their deed is a nullity, and inoperative to pass the legal estate: *Hunter* v. *Walters* (5).

Mr. *Colt*, Mr. *W. L. Selfe*, Mr. *Morgan*, Q.C., and Mr. *Cookson*, for subsequent incumbrancers.

Sir Charles Hall, V.C.:—

It appears to me to be established by the evidence that the deed of reconveyance was executed by *Watkins* on the 23rd of December, 1869, and that the execution of the deed on that day was intended to be an execution of an incomplete character; that is, that the parties did not mean the deed so executed to be clearly and for all purposes operative as an effectual conveyance as from that time, without more, of the legal estate in the undivided moiety which alone could pass by the execution of *Watkins*. The execution was, I think, intended to be only operative on certain conditions. I think it is also established by the evidence, as well written as oral, that the reconveyance was not executed by *Collins* until the 18th of April, 1872.

That being so, the matter is in this position: The Plaintiffs

(1) Pages 58, 59.
(2) Page 10.
(3) Hob. 246.
(4) 36 a.
(5) Law Rep. 7 Ch. 75, 82, 84.

V.-C. H. 1875 WATKINS v. NASH.

had a complete legal mortgage of the property in question made to them on the 29th of December, 1866, and so matters remained until the deed was executed by *Watkins* on the 23rd of December, 1869. Now, as to this execution operating effectually or not at law, there can be no doubt that it was intended to be what is called an escrow. But it is said that the deed thus executed could not be an escrow, because it was not delivered to a stranger; and that is, no doubt, the way in which the rule is stated in some of the text-books—*Sheppard's* Touchstone, for instance; but when those authorities are examined, it will be found that it is not merely a technical question as to whether or not the deed is delivered into the hands of *A. B.*, to be held conditionally; but when a delivery to a stranger is spoken of, what is meant is a delivery of a character negativing its being a delivery to the grantee or to the party who is to have the benefit of the instrument. You cannot deliver the deed to the grantee himself, it is said, because that would be inconsistent with its preserving the character of an escrow. But if upon the whole of the transaction it be clear that the delivery was not intended to be a delivery to the grantee at that time, but that it was to be something different, then you must not give effect to the delivery as being a complete delivery, that not being the intent of the persons who executed the instrument. As regards the instrument in question, it might very well, under the circumstances, be meant and taken to be a delivery by *Watkins* to *Collins*, to be held by him for the purpose of being delivered over to the grantee when the transaction was complete. I see no difficulty whatever in that view being adopted.

Then, as regards the subsequent delivery, when the deed was executed on the 18th of April, 1872, by *Collins*, I see no difficulty, if necessary, in holding that, if that were a delivery to *Skyrme* himself, it was a delivery to him as an agent for all parties for the purpose of that delivery. And in holding that there may be delivery to a third party for the benefit of all parties, I am confirmed by the authority of *Millership* v. *Brookes* (1).

The circumstances of that case are not exactly the same as those in the present, and perhaps the person to whom the instrument was

(1) 5 H. & N. 797.

delivered there was really a third person and a stranger; but I consider the principle upon which that case proceeded was this: that the delivery was not to the grantee, or the person who was to have the benefit of the deed, but was to some one as the person who was to hold or to be considered as holding the deed in an incomplete state for the benefit of all parties. Therefore, if it be true, as it appears from Mr. *Collins*' cross-examination, that the delivery was to *Skyrme*, I should not feel that to be insuperable evidence against the memorandum, which was undoubtedly signed at the time, to the effect that the deed was to be an escrow, and was not intended to be delivered to the grantee. But I might go further, and say, if it were necessary to determine the question, that the document might be an escrow, even though there was no particular person selected who under the circumstances could be considered as being the person into whose hands it was delivered, it being clear that there was no delivery at all to the grantee; that the delivery was not intended to be a delivery to the grantee at all, and that it was intended to be an instrument incomplete as a transfer of the legal estate until the conditions prescribed had been performed.

That being so, it follows that, in my judgment, the Plaintiffs retain and have the legal estate in the property, unaffected by anything which has taken place.

[His Honour then considered the other points in the case, and made the usual foreclosure decree, determining the priorities of the various incumbrancers.]

Solicitors: Mr. *G. F. Cooke;* Messrs. *Waterhouse & Winterbotham,* agents for Mr. *M. F. Carter, Newnham;* Messrs. *Bolton, Robbins, & Busk.*

V.-C. H.
1875
May 7.

## *In re* FLAGSTAFF SILVER MINING COMPANY OF UTAH.

*Winding-up Petition—Judgment Creditor—Issue of Execution—Companies Act*, 1862, *s.* 80, *sub-s.* 2.

Where a judgment creditor is told by the solicitors of the company indebted to him that they have no assets on which he can levy, that is such evidence of their inability to pay their debts as relieves him from the necessity of issuing execution in order to bring himself within the *Companies Act*, 1862, s. 80, sub-s. 2.

THIS was a creditor's Petition to wind up a company formed to work mines in *Utah*.

The Petition was presented by a creditor who had obtained judgment against the company, and he sought a winding-up order on the ground that the company was unable to pay its debts. The Petitioner, however, had not issued execution on his judgment, but the evidence shewed that this was because the company's solicitors had told him there was no property of the company on which he could levy. After the Petition was presented the company paid the Petitioner's debt, and the Petition now came on for hearing.

Mr. *Lindley*, Q.C., and Mr. *Graham Hastings*, for the Petitioner:—

The Petitioner, having been paid, no longer asks for the winding-up order, but he is entitled to the costs of the Petition.

Mr. *Greene*, Q.C., and Mr. *Grosvenor Woods*, for the company:—

This is a Petition by a judgment creditor, and under the *Companies Act*, 1862, s. 80, sub-s. 2, a company cannot be deemed to be unable to pay its debts unless the judgment creditor petitioning has actually issued execution, and such execution has been returned unsatisfied in whole or in part. Here the judgment creditor has not brought himself within the section by issuing execution, and consequently is not entitled to his costs.

SIR CHARLES HALL, V.C.:—

V.-C. H.
1875
*In re* FLAGSTAFF SILVER MINING COMPANY OF UTAH.

Where the judgment creditor is told by the company that they have no assets on which he can levy, that is evidence of their inability to pay their debts, so as to relieve the judgment creditor from the necessity of actually levying. The company must accordingly pay the costs of this Petition.

Solicitors: Messrs. *Jones, Roberts, & Hale;* Mr. *Snell.*

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## MICHELL *v.* WILTON.

V.-C. H.
1875
*May* 28.

[1866 M. 31.]

*Will—Annuity—Corpus or Income.*

Testator gave the residue of his estate to trustees to pay the income for the benefit of his wife and unmarried daughters and youngest son, and directed that upon the youngest son attaining the age of twenty-one years the trustees should invest a sufficient sum to secure the receipt of the annual sum of £50, to be paid by instalments as the dividends were received, to his wife for her maintenance, and subject thereto the trustees were to divide the whole of the trust estate amongst his eight children; and on the death of his wife the amount invested to secure her the annual income of £50 was to be divided in like manner amongst his eight children. The youngest son attained twenty-one in 1872. The income arising from the whole of the estate did not amount to £50 a year:—

*Held*, that the widow was not entitled to be paid any arrears out of the *corpus*.

## PETITION.

*William Wilton*, by will made on the 12th of April, 1860, after making some specific bequests, devised the residue of his estate to three trustees upon trust to pay the income for the benefit of his wife and his unmarried daughters and youngest son, and after giving certain directions not material to be mentioned, the testator directed as follows:—"That upon my youngest child attaining the age of twenty-one years my trustees shall invest, or leave invested if already there, a sufficient sum to secure the receipt of the annual sum of £50, which said sum of £50 shall be paid by monthly, or quarterly, or half-yearly instalments as the dividends

V.-C. H. 1875 MICHELL v. WILTON.

are received to my said wife for her maintenance, and subject thereto my trustees shall divide the whole of my said trust estate and effects in equal shares amongst my eight children," naming them . . . "and I further declare that upon the death of my said wife the amount so invested to secure her annual income of £50 shall be divided in like manner amongst my said eight children."

By a codicil made four days after the date of the will the testator declared that his wife should be sole trustee.

The testator died on the 25th April, 1860. The youngest child attained twenty-one years of age in 1872.

This was a Petition by the Plaintiff (one of the daughters of the testator), alleging that the income arising from the whole of the testator's estate would not amount to £50 per annum, and praying that the costs might be provided for, and that the income of the residue might be paid to the widow during her life or until further order.

Mr. *Freeling*, for the Petitioner.

Mr. *Morgan*, Q.C., and Mr. *Cookson*, for the Respondent—the widow:—

The testator's primary wish evidently was that his widow should have £50 a year; and the words "subject thereto" shew that the gift to the children was subordinate or secondary to that wish. The annuity is therefore payable out of *corpus*.

[They referred to *Birch* v. *Sherratt* (1), *May* v. *Benett* (2), *Playfair* v. *Cooper* (3), *Wright* v. *Callender* (4).]

Mr. *Bevir* for the trustees.

Mr. *Freeling*, in reply, contended that the cases cited had nothing to do with this case, and that it was governed by the decisions in *Baker* v. *Baker* (5), where, as here, there was a double gift to the widow and to the children after her death, and *Tarbottom* v. *Earle* (6), where the facts were almost identical with the present case. The words "subject thereto" did not apply to the

(1) Law Rep. 2 Ch. 644.
(2) 1 Russ. 370.
(3) 17 Beav. 187.
(4) 2 D. M. & G. 652.
(5) 6 H. L. C. 616.
(6) 11 W. R. 680.

*corpus* at all. In *Foster* v. *Smith* (1) there was, as in this case, a new trust after the widow's death to divide the amount invested, and it was held that there was no charge upon the *corpus*. The cases of *Earle* v. *Bellingham* (2) and *Sheppard* v. *Sheppard* (3) were also in point.

SIR CHARLES HALL, V.C. :—

Upon the authorities this is an extremely doubtful case. But in my opinion the cases which may be considered to be the most like this are *Baker* v. *Baker* (4) and *Tarbottom* v. *Earle* (5). *Baker* v. *Baker* was decided by the House of Lords in 1858; the case of *Wright* v. *Callender* (6) having been decided in 1852 by the Lords Justices Sir *J. L. Knight Bruce* and Lord *Cranworth*, and Lord *Cranworth* was Lord Chancellor at the time when *Baker* v. *Baker* was decided. I am of opinion that that case substantially governs the present. In reference to *Birch* v. *Sherratt* (7), I may observe that there did not exist in that case, as there does in this, a separate gift of a fund set apart to provide for the annuity. There was a direction in *Birch* v. *Sherratt* to provide for the annuity of £100 a year, but there was no separate fund out of which to pay it. It was to be paid out of the annual proceeds of the whole property, and the direction was that the trustees from and after payment of the £100 a-year should stand possessed of the trust moneys upon the trusts declared for other persons. The Vice-Chancellor *Stuart* held that the annuity was payable out of income only, but the Lords Justices were of opinion that it was charged on the *corpus* in case of any deficiency of income. That case, therefore, does not apply to the present, where there is a separate gift of the fund ordered to be set apart for the purpose of providing for the annuity. In the case of *Wright* v. *Callender* the direction to set apart a fund to provide for the annuity was followed by another direction that after the annuitant's death the sum to be invested should fall into the residue. There was also a subsequent direction that upon the decease of the annuitant the

(1) 1 Ph. 629.
(2) 24 Beav. 445.
(3) 32 Ibid. 194.
(4) 6 H. L. C. 616.
(5) 11 W. R. 680.
(6) 2 D. M. & G. 652.
(7) Law Rep. 2 Ch. 644.

V.-C. H. 1875 MICHELL v. WILTON.

fund should be divided in like manner amongst all and every the children and child of the persons named. Treating it as residue must have assisted the Court in coming to the conclusion that nobody could take anything from that particular fund until every part of the annuity had been provided for. There were other circumstances in the case which made it a perplexing one. The Lords Justices who decided it entertained a different opinion from that of Vice-Chancellor *Kindersley*, and doubted whether they had come to the right conclusion or not. In the present case the testator directed his trustees to invest "a sufficient sum to secure the receipt of the annual sum of £50, which said sum of £50" was to be paid in instalments as the dividends were received to his wife; that is to say, the dividends were to be paid out of the sum so set apart, and subject thereto the whole of the trust estate and effects was to be divided amongst his eight children. It was contended that these words "subject thereto" have this effect, that there can be no division of the fund until payment of the annuity in full, including all arrears, and that would give to the children the fund in a diminished state. Though there is no direction that the fund shall after the death of the widow fall into the residue, yet there is an express direction that upon her death the amount so invested to secure the £50 a year shall be divided in like manner amongst his eight children. Here a specific sum was to be set apart in order to provide for the annuity, and such sum is expressly given over, not as a residue, but as a particular fund, and by a separate and independent gift to the same persons as those to whom the general fund is given. It appears to me that I am bound by the authorities, as well as by the literal interpretation of the language of the will, to hold that this fund is not one out of which any arrears of annuity can be paid to the widow.

Solicitors: Messrs. *Bolton, Robbins, & Busk;* Messrs. *Coode, Kingdon, & Cotton;* Messrs. *Vizard, Crowder, & Co.*

## *Ex parte* KING. *In re* PALETHORPE.

C. J. B.
1875
April 26.

*Secured Creditor—Voting—Proof—Dividend—Valuation of Security—Right of Trustee to Surplus—Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *ss.* 16, 40 —*Bankruptcy Rules*, 1870, *rr.* 99, 100, 101, 136, 272.

A secured creditor who, after the first meeting under a liquidation, proves for the balance of his debt less the assessed value of his security, is bound to pay over to the trustee any excess realized from the security beyond the assessed value; and this although the trustee does not object to the assessment or offer to redeem.

THIS was an appeal from a decision of one of the Judges of the *Liverpool* County Court.

On the 21st of October, 1868, *J. L. Palethorpe* assigned to *H. W. Meade King* a policy of assurance which he had, on the 19th of June, 1868, effected on his own life with the *Economic Life Assurance Society* for £1200. The assignment was in the form prescribed by the *Policies of Assurance Act*, 1867, and it was made to secure the repayment of a debt of £631 15*s.* 4*d.* which *Palethorpe* owed to *Meade King*, together with interest thereon, and the amount which the assignee might pay for premiums to keep the policy on foot. All the premiums, up to that which became due in June, 1874, were paid by *Meade King*, with the exception of one which was paid by *Palethorpe*. On the 21st of September, 1874, *Palethorpe* filed a liquidation petition, under which, on the 15th of October, a trustee of his property was appointed. At the same time the creditors granted the debtor an immediate discharge, but they fixed no time for the close of the liquidation. On the 17th of October, 1874, *Meade King* tendered a proof against the estate for £1209 1*s.* 4*d.*, for which he stated that he held the above policy as security, and he valued the security at £200, this being the then surrender value of the policy.

The trustee admitted the proof for the balance of the debt, being satisfied with the value put upon the security. He made no offer to redeem the security, and had no intention of so doing. *Meade King* intended to retain the policy, and to continue paying the premiums. On the 5th of November, 1874, *Palethorpe* died. On the 23rd of February, 1875, *Meade King* received £1195 4*s.* 5*d.*

C. J. B. 1875 *Ex parte* KING. *In re* PALETHORPE.

from the *Economic Society* in respect of the policy, a small discount having been allowed for immediate payment, and the policy was given up to the society. The amount thus received by *Meade King* was insufficient to pay what was due to him for principal, interest, and premiums.

The trustee claimed to be entitled to the whole of the sum received on the policy *ultrà* the £200 estimated by *Meade King* to be its value. He, on the other hand, claimed to retain the whole sum which he had received. The question was submitted for the determination of the County Court, a statement of facts to the above effect being agreed upon by the parties. At the time when the statement was settled the liquidation had not been closed, and no dividend had been declared.

The Judge ordered *Meade King* to pay £995 4*s.* 5*d.*, the excess of the sum received by him over the £200, to the trustee. *Meade King* appealed.

Mr. *De Gex*, Q.C., and Mr. *W. Potter*, for the Appellant:—

This decision produces a grievous hardship on the creditor, who has, by paying the premiums with his own money, created the policy which it is said is to go to pay the other creditors. We submit that the true construction of those sections of the Act of 1869, and those clauses of the Rules of 1870 which relate to the subject, does not involve any such injustice. Sect. 16, sub-s. 4 (1)

(1) Sect. 16: "The general meeting of creditors to be summoned as aforesaid by the Court, and in this Act referred to as the first meeting of creditors, shall be held in the prescribed manner, and subject to the prescribed regulations as to the quorum, adjournment of meeting, and all other matters relating to the conduct of the meeting or the proceedings thereat.

"Provided that:

"1. [Provides who is to be the chairman.]

"2. A person shall not be entitled to vote as a creditor unless at or previously to the meeting he has in the prescribed manner proved a debt provable under the bankruptcy to be due to him.

"3. A creditor shall not vote at the said meeting in respect of any unliquidated or contingent debt, or any debt the value of which is not ascertained.

"4. A secured creditor shall, for the purpose of voting, be deemed to be a creditor only in respect of the balance (if any) due to him after deducting the value of his security; and the amount of such balance shall, until the security be realized, be determined in the prescribed manner. He may, however, at or previously to the meeting of creditors, give up the security to the trustee, and thereupon he shall rank as a creditor in respect of the whole sum due to him."

of the Act, and Rules 99, 100, 101 (1), refer to a temporary valuation of a security for the purpose of voting at the first meeting of the creditors.

With respect to permanent valuation for the purpose of receipt of dividend, the provisions made are contained in sect. 40 and Rule 136 (2).

In the case of the temporary valuation, the check on the creditor is that he must pay the amount which his security produces beyond the assessed value to the trustee. In the case of the permanent valuation, the check consists in the power which is given

(1) Rule 99: "A secured creditor, unless he shall have realized his security, shall, previously to being allowed to prove or vote, state in his proof the particulars of his security and the value at which he assesses the same, and he shall be deemed to be a creditor only in respect of the balance due to him after deducting such assessed value of the security."

Rule 100: "Any secured creditor so proving shall be bound to pay over to the trustee the amount which his security shall produce beyond the amount of such assessed value, and the trustee shall be entitled, at any time before realization of such security by the creditor, to redeem the same upon payment of such assessed value."

Rule 101: "The proof of any such creditor shall not be increased in the event of the security realizing a less sum than the value at which he has so assessed the same."

These three rules come under a subdivision, Rules 87–102, which is headed "Meetings of Creditors."

(2) Sect. 40: "A creditor holding a specific security on the property of the bankrupt, or on any part thereof, may, on giving up his security, prove for his whole debt. He shall also be entitled to a dividend in respect of the balance due to him after realizing or giving credit for the value of his security, in manner and at the time prescribed. A creditor holding such security as aforesaid, and not complying with the foregoing conditions, shall be excluded from all share in any dividend."

Rule 136: "A creditor who is desirous of giving credit for the value of his security in order to entitle him to a dividend in respect of the balance of his debt after deducting the assessed value, shall give notice thereof to the trustee, and the value of his security shall be determined in the same manner as the value of the security is to be determined, as prescribed with reference to the balance upon which a secured creditor may vote, and such creditor shall give credit for the value within fourteen days after he shall be called upon by the trustee so to do, unless he shall be out of *England*, and then within such reasonable time as the trustee may fix, having regard to the means of communication between *England* and the place where the creditor may be, and in default thereof shall be deemed to be fully secured. If the trustee or any other creditor shall be dissatisfied with the value put on the security, the trustee may require the security to be realized."

This rule has a reference in the margin to sect. 40, and it occurs in a subdivision, Rules 131–137, which is headed "Dividends."

C. J. B. 1875 *Ex parte* KING. *In re* PALETHORPE.

to the trustee, or to any other creditor, if dissatisfied with the assessed value, to require the security to be sold. But if the trustee does not require this to be done, the creditor takes the security as his own property at the assessed value, and is under no further obligation to the trustee with respect to it. He is in the same position as if he had become purchaser of the security at a sale by auction, leave having been given him to bid, or as if he had foreclosed a mortgage. In the present case the proof was not for the purpose of voting; it was not made till after the first meeting of the creditors. It was a proof solely for the purpose of receiving dividend. What took place between the Appellant and the trustee amounted in substance to a sale of the policy by private contract to avoid the necessity of a sale by auction. If the decision is right, the mortgagee might have gone on paying the premiums on the policy for twenty years, and yet have been compelled to give up the security, which he had himself created, to the other creditors. Giving credit for the value of a security under Rule 136 is equivalent to realizing it. Sect. 40 contains an entirely new provision; formerly a secured creditor could not receive dividends until his security had been realized. Sect. 40 applies to liquidation as well as to bankruptcy proper by virtue of sect. 125 (sub-sect. 7). Rule 272 (1) contains, with reference to liquidation, the provisions of Rules 99–101 *totidem verbis*. Rule 136 does not, it is true, occur again among the rules which relate to liquidation, but it must be taken to apply, as sect. 40 clearly does.

Mr. *Jackson*, Q.C., and Mr. *W. R. Kennedy*, for the trustee:—

We might contend that, as the provisions of Rules 99–101 are

(1) Rule 272: "A secured creditor, unless he shall have realized his security, shall, previously to being allowed to prove or vote, state in his proof the particulars of his security, and the value at which he assesses the same, and he shall be deemed to be a creditor only in respect of the balance due to him after deducting such assessed value of the security. In cases of liquidation by arrangement, any secured creditor so proving shall be bound to pay over to the trustee the amount which his security shall produce beyond the amount of such assessed value, and the trustee shall be entitled at any time before realization of such security by the creditor to redeem the same upon payment of such assessed value. The proof of any such creditor shall not be increased in the event of the security realizing a less sum than the value at which he has so assessed the same."

expressly re-enacted with reference to liquidation, and those of Rule 136 are not, Rule 136 does not apply to liquidation at all. But we need not rely on that merely technical ground. If Rule 136 applies, it does not help the Appellant. Rule 272 is express; the words are "prove or vote;" they cannot be explained away. Rule 136 merely provides an additional test of the value of the security for the benefit, and at the instance, of the trustee. If the policy had been sold for £250 the creditor must have paid £50 to the trustee. The policy of the bankrupt law is equal distribution among the creditors. A secured creditor can never get more than the sum at which he assesses his security, except by way of proof upon the debtor's estate. A secured creditor is now, as he was not formerly, allowed to prove without first giving up or realizing his security. But this is on condition of his assessing the value of the security, and he is bound by the assessment.

Mr. *De Gex*, in reply.

SIR JAMES BACON, C.J.:—

It cannot be said that this case is without difficulty. It is the first time, so far as I know, that this particular question has arisen, at least since the Act of 1869, and there is nothing before that Act which it is useful to consider for our present purpose. It is said that the case is a very hard one, if it is decided as the learned Judge of the County Court has decided it. But however hard it may be, even if I were satisfied that it is hard, that cannot alter the law. The creditors might say that it was very hard on them that they should lose the advantage of the increased value of the policy which it acquired by the unexpected death of the person whose life was insured. The matter must be decided according to the strict law, as it stands enunciated and provided by the Statute and the Rules, and, so far as may be, according to the principle of administration in bankruptcy. The principle of administration in bankruptcy has never undergone any change; it is that which prevails in all cases of mortgages, pledges, and so on, that the creditor cannot take the whole of a part, and also a part of the whole.

C. J. B. 1875 *Ex parte* KING. *In re* PALETHORPE.

[His Honour then referred to the facts of the case, and continued:—]

Then what is the law upon the subject? The 16th section of the Act was first referred to, and it seems to provide only for the case of the voting of creditors. It provides that "a secured creditor shall, for the purpose of voting, be deemed to be a creditor only in respect of the balance (if any) due to him after deducting the value of his security; and the amount of such balance shall, until the security be realized, be determined in the prescribed manner;" which throws the case open to all the subsequent provisions of the Rules. Then the 40th section, on which Mr. *De Gex* mainly relies, as I understand his argument, provides that "a creditor holding a specific security on the property of the bankrupt, or on any part thereof, may, on giving up his security, prove for his whole debt. He shall also be entitled to a dividend in respect of the balance due to him after realizing or giving credit for the value of his security, in manner and at the time prescribed." Those words, in my opinion, introduce into the Act the Rules which have been referred to. Then the Rules go more pointedly to the subject, and the 99th provides, that "a secured creditor, unless he shall have realized his security, shall, previously to being allowed to prove or vote, state in his proof the particulars of his security and the value at which he assesses the same, and he shall be deemed to be a creditor only in respect of the balance due to him, after deducting such assessed value of the security." And Rule 100 says, "Any secured creditor so proving"—not voting—"shall be bound to pay over to the trustee the amount which his security shall produce beyond the amount of such assessed value, and the trustee shall be entitled, at any time before realization of such security by the creditor, to redeem the same upon payment of such assessed value."

These provisions seem to me to be very distinct and clear. They are very general in their operation, as they must needs be considering the multifarious transactions and almost innumerable objects to which they may be applied in the administration in bankruptcy. But the principle is quite clear. It is at the option of the creditor to say for how much he desires to come in and

share in the estate available in the bankruptcy, and what is the value of the unrealized security then in his hands; but, doing so, he is "bound to pay over to the trustee the amount which his security shall produce beyond the amount of such assessed value."

The 136th rule, on which great stress was also laid in the argument, is equally clear: "A creditor who is desirous of giving credit for the value of his security in order to entitle him to a dividend" —that is, if proving—"in respect of the balance of his debt after deducting the assessed value, shall give notice thereof to the trustee." Then it provides for the way in which the value of the security is to be ascertained, if the parties differ about it. But the 272nd rule, which has a direct application to a case of liquidation, and is to be read as if it were a statutory enactment, provides that "a secured creditor, unless he shall have realized his security, shall, previously to being allowed to prove or vote, state in his proof the particulars of his security, and the value at which he assesses the same, and he shall be deemed to be a creditor only in respect of the balance due to him, after deducting such assessed value of the security;" that is, he never can increase the amount of his proof. "In cases of liquidation by arrangement any secured creditor so proving shall be bound to pay over to the trustee the amount which his security shall produce beyond the amount of such assessed value, and the trustee shall be entitled, at any time before realization of such security by the creditor, to redeem the same upon payment of such assessed value. The proof of any such creditor shall not be increased in the event of the security realizing a less sum than the value at which he has so assessed the same."

The law seems to me to be expressed in the most distinct terms. The creditor may put whatever value he likes upon his security; if the trustee is not satisfied with that value he may take means of having the value ascertained more accurately according to his own notion; but, whether the one thing or the other is done, this is plain, if the creditor chooses to retain the security at the value he annexes to it and he afterwards receives more from it, that surplus belongs to the bankrupt's estate, and is to be administered as a part of his estate. I cannot conceive that there is any difficulty when one considers the policy of the law. The trustee

C. J. B. 1875 *Ex parte* KING. *In re* PALETHORPE.

may well say, I will not redeem you since you are a creditor for £1200, and the outside value of your security is not more than £1200; redeeming is out of the question. But I will do this, I will be content to take the security for the purposes of proof at the value you assess it, because I know that the law has provided that if, on the realization of the security, you receive more than the value you have put on it, the surplus will belong to the bankrupt's estate. That is the clear view of it, and is quite consistent with the principles of the administration in bankruptcy. Then it is suggested in argument that the trustee never offered to redeem, and that Mr. *King* intended to retain the policy and continue to pay the premiums. If he did, he did so subject to the provisions of the law, and, as I conceive, at his own risk. To attempt to treat the case as if it were one of a mortgagee coming in and asking for an account and a sale under the 78th rule, or, which is the same thing, under Lord *Roslyn's* Order, is impossible. It is not like that. The creditor does not come in and say, "Realise my security." The creditor might at a sale have purchased for himself if he had thought fit, and if he had done so he would in effect have foreclosed the mortgage and have become the owner of the property. He did not do this, he chose to keep it in his hands and to pay the premiums; and though, in respect of any premiums he had paid, he might be entitled to be reimbursed on the security being realized, he cannot in the face of the Act and of the Rules say, I am entitled to the benefit of any sum received from the policy larger than the amount which I have assessed as its value. Suppose the security, instead of a policy of insurance, had been a bill of exchange on which some other person besides the debtor was liable; that that other person was bankrupt; and that there was a prospect of getting five shillings or ten shillings in the pound from the debtor's estate; that the creditor was content to run the risk and to say, I will take the five shillings or ten shillings, and I will take the chance of getting from the other party liable in his bankruptcy whatever dividend he pays. If twenty shillings in the pound were paid instead of five shillings or ten shillings, as was contemplated, it might be said the security assessed at a certain sum turns out to be worth a great deal more. I am quite aware that in this case it was an

accident, and probably quite an unexpected accident. If the transaction was one of sale and purchase there would be an end of it; the creditor would be entitled to all the benefit of it. But the creditor in this case comes within the very words of the Act and the Rules; he has said, Let me prove and take my chance of getting the £1200 if there is a dividend of twenty shillings in the pound, subject only to the deduction of £200 at which I value my security. He has acquired that right. His proof has been admitted on those terms. The Act and Rules, in my opinion, apply in all their provisions, although it is by a mere accident that the value of the security has been shewn by realization to be a great deal more than was contemplated by any one at the time when the proof was admitted. I think that since the creditor has asserted and acquired the right to share in the bankrupt's estate in respect of a debt of £1200, reduced only by the £200, he cannot now say, I am entitled to retain that which I said was worth £200, but which has now turned out to be worth £1200, while I rank as a creditor for the amount for which I have proved. As I have said, the case is not without difficulty; in some respects it is novel; but it is, in my opinion, covered by the clear provisions of the Act and the Rules, and by the principles of the bankrupt law. The decision of the learned Judge of the County Court must therefore be affirmed.

By consent the costs of both sides of the appeal were ordered to be paid out of the debtor's estate.

Solicitors for the Appellant: Messrs. *Field, Roscoe, & Co.*, agents for Messrs. *Thornely & Dismore, Liverpool.*

Solicitors for the Trustee: Messrs. *J. Venn & Son*, agents for Messrs. *Anderson, Collins & Robinson, Liverpool.*

C. J. B.

1875

*April* 26;
*May* 3.

## *Ex parte* COCHRANE. *In re* MEAD.

*Receiver—Disturbance of Possession—Contempt—Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *ss.* 12, 13, 20, 34—*Bankruptcy Rules*, 1870, *rr.* 260, 299.

Where a receiver of a bankrupt's property has been appointed by the Court of Bankruptcy, it is a contempt of Court for the holder of a valid bill of sale of goods of the bankrupt to oust the receiver from possession which he has taken of such goods.

The only person who may interfere with the possession of a receiver is a landlord distraining for a year's rent.

Any other person who claims a better title than the receiver ought to apply to the Court of Bankruptcy for leave to enforce his rights.

*Ex parte Till* (1) explained.

THIS was an appeal from a decision of the Registrar of the *Colchester* County Court acting as Judge.

On the 15th of May, 1874, Mr. *W. Mead*, a farmer at *Wix, Essex*, executed a bill of sale of his live and dead farming stock to *Alexander Cochrane*, to secure the repayment of £200 with interest. The bill of sale was duly registered. On the 17th of March, 1875, *Mead* filed a liquidation petition. At this time *Cochrane* had not taken possession under his bill of sale. On the 18th of March *E. J. Clarke* was appointed by the Court receiver of the debtor's property and manager of his business, and the same day he took possession of the debtor's effects on his farm, and left a man in possession. On the 23rd of March, *Cochrane*, who had had notice of the petition and of the appointment of the receiver, acting under the powers given to him by the bill of sale, sent a number of men to take possession on his behalf, and these men forcibly seized seven horses, which were then at work on the farm, and drove them away. On the 24th of March, on the application of the receiver, an *ex parte* injunction was granted to restrain *Cochrane* from taking any further proceedings by sale or otherwise under the bill of sale until the 8th of April (the first meeting of the creditors under the petition having been fixed for the 7th of April), the receiver giving an undertaking to be answerable in

(1) Law Rep. 16 Eq. 97.

C. J. B.
1875
*Ex parte* COCHRANE.
*In re* MEAD.

damages to *Cochrane*. At the meeting on the 7th of April the creditors met and separated without passing any resolution, and on the 8th of April *Mead* was adjudicated a bankrupt on a creditor's petition. The same day a motion on behalf of *Cochrane*, asking that the injunction might be dissolved, and that the receiver might be ordered to pay him damages, and another motion on the part of the receiver that the interim injunction might be continued, were heard together, and the Registrar ordered that the injunction should be extended until the 7th of May, "in order that the parties who wrongfully took possession of the goods may have the opportunity to purge the contempt of Court which has been committed."

*Cochrane* appealed.

Mr. *De Gex*, Q.C., and Mr. *Robson*, for the Appellant:—

The Appellant seized chattels which were his own property by virtue of a duly registered bill of sale. This he had a right to do. There is no reason why a person whose property is wrongfully taken possession of by a receiver should apply to the Court *pro interesse suo* in order to get rid of the receiver's possession. A receiver appointed by the Court of Bankruptcy stands in a wholly different position from a receiver appointed by the Court of Chancery in a suit, and the disturbance of his possession does not amount to a contempt of Court: *Ex parte Till* (1). The holder of a registered bill of sale has a title quite as good as a landlord distraining for rent, which was the case in *Ex parte Till*. A receiver in bankruptcy is appointed *ex parte* at the instance of the petitioning creditor or the liquidating debtor, and he is appointed receiver only of the property of the debtor. He cannot have a right to more than a trustee in bankruptcy. When a receiver is appointed by the Court of Chancery he is appointed to receive specified property, and even then the order appointing him is made without prejudice to the rights of prior mortgagees: *Davis* v. *Duke of Marlborough* (2). He is appointed, too, on behalf of all the parties to the suit, and he has, as a general rule, to give security. In bankruptcy he is appointed *ex parte*, behind the

(1) Law Rep. 16 Eq 97. (2) 2 Sw. 108.

C. J. B. 1875

*Ex parte* COCHRANE. *In re* MEAD.

back of a mortgagee, and without giving security: *Ex parte Betts* (1); *Ex parte Warren* (2).

Mr. *Winslow*, Q.C., and Mr. *C. E. Jones*, for the receiver:—

The ordinary course of the Court is to restrain the proceedings of creditors till after the appointment of a trustee. Rule 260 implies that a receiver when he has taken possession has a right to retain it, and Rule 299 shews what are the powers of the Court with regard to a receiver (3).

By sect. 20 of the Act the trustee has the powers of a receiver appointed by the Court of Chancery (4).

The receiver is an officer of the Court, and no one has a right to disturb his possession. Any one claiming an adverse title ought to apply to the Court for leave to enforce his rights. *Ex parte Till* is not inconsistent with this argument. All that was decided there was that, inasmuch as the Act which gives the authority to appoint a receiver itself reserves to the landlord of the debtor a priority in respect of a year's rent, the receiver's rights must be taken to be subject to that priority. *Ex parte Betts* and *Ex parte Warren* are not in point. In *Ex parte Jay* (5) Lord *Selborne* said: "The receiver was appointed, and came under the ordinary obligations of a receiver;" that must mean the obligations of a receiver appointed by the Court of Chancery. The way in which the Court of Chancery deals with a person who forcibly takes property out of the possession of a receiver whom

(1) 22 L. T. (N.S.) 245.

(2) Law Rep. 10 Ch. 222.

(3) Rule 260 provides: "The Court may also, at any time after presentation of the petition, appoint a receiver or manager of the property or business of the debtor, or of any part thereof, and may direct immediate possession to be taken of such property or business, or any part thereof."

Rule 299: "The Court shall have the same power and discretion as to the appointment, remuneration, and removal of the receiver or manager, and in the settlement of his accounts, and in directing the appropriation of moneys or property in his hands, as is exercised by the Court of Chancery, or as near thereto as may be."

(4) Sect. 20 provides: "The trustee shall, in relation to and for the purpose of acquiring or retaining possession of the property of the bankrupt, be in the same position in all respects as if he were a receiver of such property appointed by the Court of Chancery, and the Court may, on his application, enforce such acquisition or retention of property accordingly."

(5) Law Rep. 9 Ch. 133, 136.

it has appointed is shewn by *Russell* v. *East Anglian Railway Company* (1); *Ames* v. *Trustees of the Birkenhead Docks* (2). In *Ex parte Anderson* (3), Lord Justice *Giffard* observes upon the power given by sect. 13 of the Act to appoint a receiver, that the object is to preserve the property "until there is an adjudication, and a person before the Court who can stand in the position of a Plaintiff."

Mr. *De Gex* in reply:—

The fact that sect. 20 expressly gives to the trustee the powers of a receiver appointed by the Court of Chancery, goes to shew that a receiver in bankruptcy has not these powers. A receiver in bankruptcy must (if necessary) defend his possession by obtaining an injunction from the Court. In this case there was no application to commit the Appellant for contempt, and even if he had been guilty of a contempt, the Court had no power to take away his property from him. As to *Ex parte Till* (4), I say that it applies. For the effect of sect. 34 of the Act is to cut down the common law right of a landlord to distrain to one year's rent, while sect. 12, which provides that after an adjudication of bankruptcy no creditor who has a debt proveable in the bankruptcy shall have any remedy in respect of it against the bankrupt's property except in manner directed by the Act, expressly enacts that "this section shall not affect the power of any creditor holding a security upon the property of the bankrupt to realize or otherwise deal with such security in the same manner as he would have been entitled to realize or deal with the same if this section had not been passed." If *Ex parte Till* applies only to a landlord, then the result might be that, if a receiver is appointed, the landlord could distrain a mortgagee's property, while the mortgagee could not take possession of his own property. Thus the appointment of a receiver would alter the rights of the parties, which, as was said in *Ex parte Rocke* (5), it was not intended to do. I say that the appointment of a receiver is intended, like that of the messenger formerly, only to protect the property against executions. Another objection to the order is that it contains no undertaking as to damages.

(1) 3 Mac. & G. 104.
(2) 20 Beav. 332.
(3) Law Rep. 5 Ch. 473.
(4) Ibid. 16 Eq. 97.
(5) Law Rep. 6 Ch. 795.

C. J. B. 1875 *Ex parte* COCHRANE. *In re* MEAD.

SIR JAMES BACON, C.J.:—

This case is in one point of view of very great importance. The simple question is whether a man having become insolvent by the presentation of his petition on the 17th of March, a receiver having been appointed of all his property on the 18th, and having then taken possession under the order—whether the property was not then so (as the order of the learned County Court Judge states) in the custody of the law as that nobody, however good his title, could interfere with it without permission first obtained from the Court. That is the important question; and bearing in mind what was said in *Ex parte Rocke* (1), that the discretionary power of the Court to grant injunctions was not meant to interfere with the rights of parties, and keeping in mind also the arguments of Mr. *De Gex* and Mr. *Robson*, that the effect of the bill of sale was that the property seised became the creditor's, still the question remains whether the law having, on the 18th March, by its officer, taken these chattels into its custody, it was competent to the Appellant to wrest them out of that possession. That is the important question. If that is the law, if a man (I will assume with a good title) were at liberty to turn the receiver out of possession, in my opinion the appointment of a receiver would, in a great many cases, be utterly fruitless. Where is the hardship upon the Appellant? Assuming that his title is good (as to which I have nothing now to decide), where is the hardship in his having to come to the Court, saying, "A receiver appointed by you has taken my property; he has got it, and holds it in his hands, and therefore I ask you to order him to relax his hold, and to give me back what is mine?" No such proceeding has been taken by the Appellant in this case, but with a strong hand he wrests from the receiver the chattels in his possession (which in this instance were agricultural horses employed in the labour of the farm), and drives them away. If it is competent for any man in this country, where the law is administered I hope justly, so to take the law into his own hands, and frustrate the proceedings of an established Court, I think it would be a matter greatly to be regretted. Still that is the case before me. The Appellant has never come to the

(1) Law Rep. 6 Ch. 795.

Court *pro interesse suo*, or asserted any right except by means of the affidavit upon which he moved to discharge the injunction. Upon that motion the Court found the case in the position mentioned in *Ex parte Anderson* (1); there was no person who could stand on behalf of the estate in the position of a Plaintiff; there was a receiver, but no trustee. There had been an adjudication made that day, and the Judge simply postponed the consideration of the question submitted in the notice of motion to the 7th of May, by which day the trustee must be appointed. That is all the order does, and of that no complaint is made by the notice of appeal. The order, it is true, contains these words: "Until the 7th day of May, that the parties who wrongfully took possession of the goods may have the opportunity to purge the contempt of Court;" words which have no kind of operation with respect to the adjournment, because it may be that the Judge will reserve that question of contempt, and, if he finds that the contempt was unintentional, as was that of the sheriff in *Russell* v. *East Anglian Railway Company* (2), he may say, "It is a contempt, because it interfered with the administration of the law, but it is not a contempt which ought to be visited by any penalty, even that of costs." The order, it is said, is defective because it contains those words. But before the 7th of May has arrived, before the time has come at which any person can lay claim to these goods (because the receiver claims nothing), before anybody lays claim to the goods which are to be administered by the law in the Bankruptcy Court, comes this appeal, asking me to reverse that order. I cannot do so. The learned Judge did no more than what was perfectly right according to all the circumstances in evidence before him, and upon plain proof of the fact that, after five days, during which the Court, the law, had been in possession of this property, it was taken out of the custody of the law by the act of the Appellant. The Court might very reasonably say, "We will wait until some person shall be competent to discuss your legal right in respect to these chattels, and when that has been discussed we will settle the other question about the contempt, and what you have to pay." It is true that the undertaking as to damages is not mentioned in

(1) Law Rep. 5 Ch. 473.

(2) 3 Mac. & G. 104.

C. J. B. 1875 *Ex parte* COCHRANE. *In re* MEAD.

the order, but it still remains as a continuing undertaking, that undertaking which the receiver gave on his appointment to abide by any order the Court might think fit to make as to damages, in case the Court should be of opinion that the Appellant had sustained any by reason of the order. Then, matters so standing, I am asked to discharge this order, and a long argument has been addressed to me to shew that by the bill of sale which was executed the Appellant has a right to these goods. He may have a perfectly good right, but, until the County Court Judge hears what the trustee has to say on the subject, it is not reasonable that, the receiver being in possession of those rights which the administration of the law gives him, it should be competent to any man to come with a strong hand and take possession of that which the law has given to the officer of the Court. The Appellant may have a right, but he is bound to make an application to the Court for leave to exercise his legal rights. After the Court had, in accordance with the statute, appointed an officer, who was responsible for the possession and accountable to the Court for the property entrusted to him, and when that property was simply wrested from him by force, is it to be contended that the Court could not say, This is a thing which must be inquired into; for that is all that the Court really did say? I am told that in *Ex parte Till* (1) I decided in favour of the Appellant's contention, and that there can be no question whatever about it. *Ex parte Till* decided simply this: A landlord having by law a right to distrain for rent due to him, the bankruptcy law has curtailed that right only in one respect, by limiting the amount for which he can distrain to a year's rent. But for that, the common law remains unchanged, and it remains as a law paramount, and the law relating to bankruptcy has plainly recognised that right, so that the landlord, whenever there is a bankruptcy, shall have a right to distrain, but shall not exercise that right for more than one year's rent. What has that to do with the appointment of a receiver? The receiver takes the whole of the bankrupt's property, but he takes it subject to the paramount right of the landlord to distrain for that amount. *Ex parte Till* carries it no further than that. It has no application to the case now before me. The receiver

(1) Law Rep. 16 Eq. 97.

C. J. B. 1875 *Ex parte* COCHRANE. *In re* MEAD.

has a right to take the goods into his possession in order that they may be applied in such way as the law directs. If the law gives them to the Appellant, he will have them. But that is no reason why an injunction should not be granted, and it is necessary to restrain him from committing a contempt of Court, because his legal right is not established until he has removed that right which the receiver acquired by the order appointing him. In my opinion this appeal must be dismissed.

It was then, after some discussion, arranged that, on the trustee (who had been appointed during the pendency of the appeal) paying to the Appellant the balance due to him under his bill of sale, the horses should be given up to the trustee. All other questions to be dealt with by the Judge of the County Court. No order was made as to the costs of the appeal.

Solicitors for the Appellant: Messrs. *Evans & Eagles*, agents for Mr. *E. T. Smith, Colchester.*

Solicitors for the Trustee: Messrs. *Beaumont & Warren*, agents for Mr. *Neck, Colchester.*

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## *Ex parte* FERRIGE. *In re* FERRIGE.

C. J. B. 1875 *May* 3.

*Contempt—Committal—Notice of Application—Computation of Time—Sunday—Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *s.* 114—*Bankruptcy Rules*, 1870, *rr.* 178, 179.

Three clear days' notice must be given of an application to commit a person for contempt of Court, and if the last of the three days happens to be a Sunday it is not to be counted in the computation of the three days.

THIS was an appeal from a decision of the Judge of the *Croydon* County Court.

*George William Ferrige* and *Henry Ferrige*, bankrupts, were ordered by the Court to file an amended statement of their affairs. They failed to obey this order, and the trustee then applied for an order to commit them for contempt of Court. Notice of this application was served upon them on the 1st of April, 1875. The day

C. J. B. 1875 *Ex parte* FERRIGE. *In re* FERRIGE.

mentioned in the notice for the hearing of the application was the 5th of April, and on that day the application was heard, the bankrupts appearing, and an order for commitment was made against them. The 4th of April was a Sunday. The bankrupts appealed.

Mr. *Bagley*, for the Appellants:—

Three days' clear notice ought to have been given of the application: *Bankruptcy Rules*, 1870, rules 178, 179; and in computing the three clear days Sunday, if it is the last day, is not to be counted: *Bankruptcy Act*, 1869, sect. 114 (1). The notice, therefore, was insufficient.

Mr. *Wildy Wright*, for the trustee:—

This objection was not taken in the County Court, and cannot be taken now: *Ex parte Isaac* (2). If the objection was a good one, the irregularity was waived by the appearance of the Appellants without protest. But sect. 114 does not apply to the giving of a notice of this kind; it is not the "doing of an act," or the "taking of a proceeding."

(1) Rule 178: "An application to the Court to commit any person for contempt of Court shall be supported by affidavit, and be filed in the Court in which the proceedings are."

Rule 179: "Upon the filing of such application the Registrar shall fix a time and place for the Court to hear the application, and shall issue a notice, to be served by an officer or high bailiff of the Court personally on the person sought to be committed three days at the least before the day of hearing the application, unless the Court shall, by order upon good cause shewn, direct service of the notice to be made in some other manner, in which case it shall be served, together with a copy of the order, in the manner so directed."

Sect. 114: "Where by this Act any limited time from or after any date or event is appointed or allowed for the doing of any act or the taking of any proceeding, then in the computation of such limited time the same shall be taken as exclusive of the day of such date or of the happening of such event, and as commencing at the beginning of the next following day; and the act or proceeding shall be done or taken at latest on the last day of such limited time according to such computation, unless such last day is a Sunday, Christmas Day, Good Friday, or Monday or Tuesday in Easter week, or a day appointed for public fast, humiliation, or thanksgiving, or a day on which, in pursuance of a notification by the Lord Chancellor under this Act, the Court does not sit, in which case any act or proceeding shall be considered as done or taken in due time if it is done or taken on the next day afterwards, not being one of the days in this section specified."

(2) Law Rep. 6 Ch. 58.

C. J. B.
1875
*Ex parte* FERRIGE.
*In re* FERRIGE.

SIR JAMES BACON, C.J.:—

There ought to be no question about this; it is a matter of every day practice. Sect. 114 clearly applies to every proceeding. In a matter concerning the liberty of the subject the utmost strictness must be observed. The case cited has no application. The order of commitment was irregularly made, and it must be discharged. But the Appellants must undertake to bring no action against the trustee.

Solicitor for the Appellants: Mr. *W. A. Smith.*
Solicitor for the Trustee: Mr. *W. Foster.*

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## *Ex parte* GORDON. *In re* GOMERSALL.

C. J. B.
1875
*May* 24.

*Liquidation—Receiver and Manager—Investigation of Debtor's Affairs—Valuation of Debtor's Assets—Costs—Employment of Debtor to assist in Management of Business—Remuneration—Bankruptcy Act,* 1869 (32 & 33 *Vict. c.* 71), *ss.* 26, 38—*Bankruptcy Rules,* 1870, *rr.* 260, 261, 262.

A receiver and manager of the property and business of traders who had filed a liquidation petition was appointed by the Court under Rule 260. Without obtaining any previous sanction from the Court or the creditors, he expended a considerable sum in obtaining a valuation of the debtors' assets, and he also employed the debtors to assist in managing the business at a weekly salary:—

*Held,* that the Court had a discretion as to allowing the sums so expended, and that under the circumstances they had been properly allowed:

*Held,* also, that the sanction of the Court to the expenditure could be given after it had been made.

It is the duty of a receiver, whether appointed by the Court or nominated by the creditors, to investigate the state of the debtor's affairs, and inform the creditors at their first meeting what he believes to be the value of the debtor's assets.

IN this case there were two appeals from two orders made by the Judge of the *Dewsbury* County Court.

*John Gomersall* and *J. F. Gomersall* were woollen manufacturers at *Dewsbury*. On the 3rd of September, 1874, they filed a liquidation petition. They had previously placed their books in the hands

C. J. B. 1875 *Ex parte* GORDON. *In re* GOMERSALL.

of Mr. *J. D. Good*, an accountant, for the purpose of making out a statement of their affairs. Immediately after the filing of the petition, *Good* was, on their application, appointed receiver of their property and manager of their business. He, without any order of the Court, and without the sanction of any of the creditors, employed some valuers to make a valuation of the debtors' assets, at a cost of £300. The assets consisted of freehold and leasehold property, machinery, woollen goods, both finished and raw, engines, shaftings, and other apparatus affixed to the debtors' mills. He also, without any authority from the Court or the creditors, employed the debtors for a period of eight weeks to assist in the management of the business, at a salary of £15 a week. The property was valued at more than £28,000. The first meeting of the creditors was held on the 22nd of September, and a statement of the debtors' affairs, which had been prepared by *Good*, was produced. The creditors resolved to accept a composition of 7*s.* 6*d.* in the pound, to be paid in instalments, the payment of which was to be guaranteed by some persons mentioned by the debtors, and a further sum of 1*s.* 6*d.* in the pound, without any guarantee. The second meeting of the creditors was held on the 3rd of October, and it then appeared that the proposed guarantors declined to give the guarantee. The creditors thereupon separated without passing any resolution.

On the 5th of October the debtors were adjudicated bankrupts on a creditor's petition, and on the 23rd of October Mr. *John Gordon* was appointed trustee of their property. A committee of inspection, consisting of five of the creditors, was also appointed. Mr. *Good* claimed to be paid by the trustee the costs of the valuations, and also the amount of the allowance which he had made to the bankrupts for their services in carrying on the business. The trustee, by the direction of the committee of inspection, declined to pay these sums. *Good* then applied to the Court for an order that the costs of the valuation should be paid to him. The Judge ordered that these costs should be allowed, subject to their being taxed by the Registrar. From this order the trustee appealed.

With regard to the sum claimed for remuneration of the bank-

rupts, the trustee applied to the Court for its direction as to whether he should allow it to *Good* in his accounts as receiver and manager. The Judge ordered that it should be allowed. From this order the trustee also appealed.

Mr. *De Gex*, Q.C., and Mr. *Finlay Knight*, for the first appeal:—

This receiver was appointed by the Court under Rule 260. Even if Rule 262 would have authorized a receiver nominated by the creditors in incurring this expense, it does not apply to a receiver appointed by the Court. At any rate, the sanction of the Court ought to have been first obtained (1).

It is clear from the evidence that the valuation of the property has been made on the footing of a forced sale, whereas it ought to have been made on the footing of a sale as a going concern. It is a perfectly useless valuation, and could only have been made in the interest of the debtors, with a view to induce the creditors to accept a smaller composition than they would otherwise have agreed to.

[They cited *Ex parte Russell* (2).]

Mr. *Little*, Q.C., and Mr. *E. C. Willis*, for the receiver, were not called on.

(1) Rule 260 provides: "The Court may at any time after presentation of the petition appoint a receiver or manager of the property or business of the debtor, or of any part thereof, and may direct immediate possession to be taken of such property or business or any part thereof."

Rule 261: "Any receiver or manager so appointed shall enter upon and act in the performance of his office at such time and in such manner and to such extent, as the Court may from time to time direct."

Rule 262 provides: "A trader shall state in his petition the estimated amount of the debts owing by him to his creditors, and, where no receiver or manager has been appointed by the Court, a majority in value of such creditors may, at any time prior to the passing of the special or extraordinary resolution, as the case may be, nominate and appoint a receiver or manager of the trade effects or business of the debtor, or any part thereof, according to the form in the schedule. Where any such receiver or manager has been so appointed he shall investigate the state of the debtor's affairs, and report thereon to the general meeting of creditors."

(2) 5 D. M. & G. 373. 18 Jur 411

C. J. B. 1875 *Ex parte* GORDON. *In re* GOMERSALL.

SIR JAMES BACON, C.J.:—

The receiver has only such powers as the Court delegates to him in the first instance, or sanctions the exercise of by him afterwards. But I think that the Appellant's counsel have endeavoured to give much too narrow a construction to the Rules. The 260th rule provides for the appointment by the Court of a receiver or manager, with power to take immediate possession of the debtor's property or business, and by Rule 261 any such receiver "shall enter upon and act in the performance of his office at such time, and in such manner, and to such an extent, as the Court may from time to time direct." Now, although that speaks of the future, I am not at all sure that the proper construction of it is not this—that the Court's direction or sanction may as well be given after a thing is done, provided the Court is satisfied that it has been well and properly done, as the Court may unquestionably direct it to be done in the first instance. Then by the 262nd rule the duties of a receiver nominated by the creditors are very distinctly pointed out. It was not at all necessary to point them out in the Rule relating to the appointment of a receiver by the Court, because as the power was to proceed from the Court in the first instance, it is left with the Court to regulate the proceedings of the receiver. Where, however, the creditors take the matter in hand under the 262nd rule, there the nature of the duties of the receiver, which are to be discharged for the benefit of the creditors, is more distinctly pointed out. [His Lordship read the 262nd rule.] But I should be narrowing the interpretation of the Rule if I were to say that its provisions apply only where the receiver is appointed by the creditors, the Court not having made the appointment. The duties of the receiver are so clearly pointed out that no one can doubt what the Court in its discretion would direct the receiver appointed by it to do. The receiver is to investigate the state of the debtor's affairs, not to examine into his accounts, but to investigate the state of his affairs, and to report thereon to the general meeting of the creditors. That is his duty. He must make himself acquainted with the nature of the debtor's property in order to arrive at the state of his affairs. In this case it appears from the evidence that the debtors' property consists of freehold

and leasehold estates, goods manufactured and raw, and plant of very considerable value. Whether the receiver is appointed by the Court or by the creditors, it must be his duty, when the meeting of the creditors takes place, to present himself there, and to say, I have investigated the state of the debtor's affairs, and I have ascertained what is the value of the assets in respect of which he is about to submit a proposition for a composition. It is right that you should know what means he has available to satisfy his debts. These proceedings are taken in the interest of the creditors. Yet, because the Rules do not in terms say that a receiver appointed by the Court is to discharge the same duties as a receiver nominated by the creditors, I am asked to say that the receiver who has been appointed by the Court, who has discharged his duties, as I must assume, to the satisfaction of the Court, and who has the sanction of the Court for the making of this valuation, and who is, in the opinion of the Court, entitled to be allowed the costs of making it, subject to taxation by the officer of the Court (than which no order can be more consistent with a proper administration in bankruptcy), is to be disallowed these costs, because, it is said, I should be laying down a general rule that a receiver appointed by the Court has power to make any valuations he pleases. I lay down no such rule, nor did the learned Judge of the County Court. But, having full means of judging, and the power of exercising his discretion, he was of opinion that it was in the interest of the creditors that the valuation should be made, and that it was just that the receiver, who had simply discharged his duty, should be reimbursed for all that he had expended in that way, subject, as I have said, to taxation. If it were only a question whether this was a proper exercise of the discretion of the Court, I should have hesitated to interfere with what the learned Judge has done. He is far better acquainted with the circumstances than I am, and what I have said is for the purpose of guarding myself against its being supposed that I have laid down any general rule that a receiver is at liberty always to make charges of this kind. In my opinion there is no ground whatever for this appeal, and it must be dismissed with costs.

C. J. B. 1875 *Ex parte* GORDON. *In re* GOMERSALL.

Mr. *De Gex*, Q.C., and Mr. *Finlay Knight*, for the second appeal:—

By sects. 26 and 38 express power is given to the trustee, with the consent of the creditors, to employ the bankrupt in the carrying on of his business, and to allow him a remuneration for so doing. No such power is given to a receiver or manager, and the inference is that he was not intended to have it. At any rate, he cannot incur such an expense without the previous consent of the creditors.

The counsel for the Respondent were not called upon.

SIR JAMES BACON, C.J. :—

The Rule gives the Court power to appoint a manager of the debtor's business. How is he to manage the business without employing proper persons to assist him? And if so, why may he not employ the debtors, if they are proper persons, and remunerate them for their services? It is a matter entirely within the discretion of the Court. This is a most unreasonable and idle appeal, and it must be dismissed with costs.

Solicitors for the Appellant: Messrs. *Williamson, Hill, & Co.*, agents for Messrs. *Bond & Barwick, Leeds.*

Solicitor for the Receiver: Mr. *C. Walker, London* and *Dewsbury.*

## TAYLOR *v.* TAYLOR.

M. R.
1875
*May* 31.

[1873 T. 99.]

## *Ex parte* TAYLOR.

*Will—Settled Estate—Trustees—Tenant for Life—Possession—Leases and Sales of Settled Estates Act* (19 & 20 *Vict. c.* 120), *s.* 32.

A testator, after devising two fifths of certain real estate to which he was entitled to trustees upon trust to receive the net rents and pay them to *M.* for life for her separate use, devised his residuary real and personal estate to the same trustees upon trust to receive the annual and other rents, interest, and income of his said real and personal estate, and after defraying thereout all ground and landlord's rent (if any), and all taxes charges, and expenses of insurance, repairs, collection, and other necessary outlay, to pay the net annual rents, interest, and income, then left to *M.* for life for her separate use. The will contained no power of leasing:—

*Held*, that *M.* was not "entitled to possession or receipt of the rents and profits" of the testator's residuary real estate, within the meaning of sect. 32 of the *Leases and Sales of Settled Estates Act*, and consequently that *M.* was not entitled to grant leases thereof.

24 Ch
239

*JAMES MOLYNEUX TAYLOR*, by his will, dated the 13th of May, 1870, made certain devises and bequests in favour of his wife, *Marianne Taylor*. The will then proceeded as follows:—"And whereas by the indenture of settlement, bearing date on or about the 30th day of August, 1848, made previously to and in contemplation of my marriage with my said wife, *Marianne Taylor*, then *Marianne Crossland*, widow, my share and shares, original and accruing, of and in the net annual rents, interest, and income of the residue of the real and personal estate of *James Taylor*, deceased, my late father, directed by the will of the said *James Taylor*, bearing date on or about the 19th day of May, 1846, to be paid to his five children, myself *James Molyneux Taylor*, *George Thomas Taylor*, *Ann Taylor*, *Sophia Taylor*, and *Maria Taylor*, for their natural lives, share and share alike, with benefit of survivorship as to two shares thereof between myself and my said brother, the said *George Thomas Taylor*, and as to three shares thereof between my sisters, the said *Ann Taylor*, *Sophia Taylor*, and *Maria Taylor*, were under and by virtue of the authority and power in that behalf in the said

VOL. XX. X 2

Subly anon petn for sanction of lease under s. 2 was presented by same pers but not proceeded because & not only the parties by by pers entitled hands to profits & was opposed by petn ultimately settled 2 Ch D. 426 MR affd 3 Ch D. 145 C.A.

M. R.
1875
TAYLOR
v.
TAYLOR.
Ex parte
TAYLOR.

will granted, assured, transferred, and set over to *William Espivent de la Villesboisnet* and *John Grady*, their executors, administrators, and assigns, but for and only during the lives and life of the said *Ann Taylor*, *Sophia Taylor*, and *Maria Taylor*, and the survivor of them, and no longer, upon the trusts, for the purposes, and subject to the restrictions and limitations in the same indenture expressed and contained of and concerning the same; And whereas the said *George Thomas Taylor* has since departed this life; and whereas the interests comprised in the said indenture of settlement, and subject to the provisions therein for the separate use and benefit of the said *Marianne Taylor*, consist of two fifth shares of the said net annual rents, interest, and income of the said residue of the real and personal estate of the said *James Taylor*, deceased; and the same interests and provisions are liable to wholly cease and determine on the death of the survivor of them, the said *Ann Taylor*, *Sophia Taylor*, and *Maria Taylor* in the lifetime of the said *Marianne Taylor*, and the said *Marianne Taylor* would be thereby left without any proper and competent marital provision; And whereas under and by virtue of the said will of the said *James Taylor*, deceased, I am seised or possessed of or otherwise absolutely entitled in reversion expectant, upon the decease of my said three sisters, the said *Ann Taylor*, *Sophia Taylor*, and *Maria Taylor*, to the said residue of the said real and personal estate of the said *James Taylor*, deceased; Now, from and after the decease of the survivor of them, the said *Ann Taylor*, *Sophia Taylor*, and *Maria Taylor*, and in case my said wife, *Marianne Taylor*, shall be then living, I give, devise, and bequeath two undivided equal fifth parts or shares, the whole into five equal parts or shares being considered as divided, of and in the said residue of the said real and personal estate of the said *James Taylor*, deceased, so given, devised, and bequeathed to me by the said will of the said *James Taylor*, deceased, as aforesaid, unto and to the use of *William Hoy* and *Jeremiah Keily*, their heirs, executors, administrators, and assigns, upon trust that they the said *William Hoy* and *Jeremiah Keily*, or the survivor of them, or the heirs, executors, or administrators of such survivor, do and shall, during the life of the said *Marianne Taylor*, receive, perceive, and take the net annual produce, rents, interest, and income of the said

two fifth parts or shares of the said residue of the said real and personal estate, and pay, apply, and dispose of the same net annual rents, interest, and income, to and for the said *Marianne Taylor* during her life and for her separate use," without power of anticipation, "and from and after the decease of the said *Marianne Taylor*, do and shall grant and assign or otherwise convey and assure the said two fifth parts or shares of the said real and personal estate to the person or persons who, under the dispositions of this my will, or any codicil or codicils thereto, shall be entitled to the residue of my real and personal estate." And after bequeathing two annuities and certain pecuniary legacies, which he charged on his residuary real and personal estate, the testator continued as follows:—"I give, devise, and bequeath all the rest, residue and remainder of my real and personal estate, of what nature or kind soever, and wheresoever, subject, however, as to so much and such part of my said residuary real and personal estate as consists of the said two fifth parts or shares of the residue of the real and personal estate of the said *James Taylor*, deceased, to the trusts, purposes, restrictions, and limitations thereof expressed and contained in the said indenture of settlement of the 30th August, 1848, and to the testamentary dispositions and provisions of and concerning the same, to take effect on the determination of the said indenture hereinbefore contained; and as to the remaining three fifth parts or shares of the said residue, to the life interests therein of the said *Ann Taylor*, *Sophia Taylor*, and *Maria Taylor*, and also subject, as to my said residuary real and personal estate, to the before-mentioned charge and payment of the said two several annuities and pecuniary legacies, unto and to the use of the said *William Hoy* and *Jeremiah Keily*, their heirs, executors, administrators, and assigns, upon trust that they the said *William Hoy* and *Jeremiah Keily*, or the survivors or survivor of them, or the heirs, executors, or administrators of such survivor, do and shall receive, perceive, and take the annual and other rents, interest, and income of my said residuary real and personal estate (but subject as aforesaid), and after defraying thereout all ground and landlord's rent (if any), and all taxes, charges, and expenses of insurance, repairs, collections, and other necessary outlay, and in case the said *Marianne Taylor* shall be then living, and have sur-

M. R. 1875 TAYLOR v. TAYLOR. *Ex parte* TAYLOR.

vived the said *Ann Taylor*, *Sophia Taylor*, and *Maria Taylor*, do and shall pay, apply, and dispose of the net annual rents, interest, and income then left, to and for the said *Marianne Taylor*, during her life for her separate use," without power of anticipation, "and in case the said *Marianne Taylor* shall be then dead, and the said *Ann Taylor*, *Sophia Taylor*, and *Maria Taylor*, or any two or one of them shall be living, then do and shall pay the said net annual rents, interest, and income, to the said *Ann Taylor*, *Sophia Taylor*, and *Maria Taylor*, in equal shares, and if only two of them be living, then to the two in equal shares, and if one only shall be living, then the whole to that one; and from and after the decease of the said *Marianne Taylor*, *Ann Taylor*, *Sophia Taylor*, and *Maria Taylor*, do and shall grant and assign, or otherwise convey and assure my said residuary real and personal estate unto and to the use of such person or persons, for such estates or estate, interests or interest and purposes and purpose as I may by any codicil or codicils to this my will hereinafter nominate, limit, and direct." The will contained no power to grant leases.

The testator made several codicils to his will, by the last of which, dated the 24th of April, 1869, he appointed *James Cuddon* as a trustee in place of *William Hoy*, and he gave further pecuniary legacies, and gave the ultimate residue of his estate to *Jeremiah Keily* absolutely; but in case he should die in the lifetime of the testator's wife or sisters, he gave such residue to his wife and sisters in equal shares, or to the survivor of them. The testator died in April, 1870.

The suit of *Taylor* v. *Taylor* was instituted to administer the estate of the testator's father, *James Taylor*. A suit of *Taylor* v. *Keily* was also instituted to administer the estate of the testator.

The testator's sisters, *Ann*, *Sophia*, and *Maria*, were all dead. *Marianne Taylor* had entered into contracts for granting leases of portions of the real estate comprised in the wills of *James Taylor* and the testator. An application was now made in the suit of *Taylor* v. *Taylor* that the contracts might be approved by the Court, and leases granted in pursuance thereof.

Mr. *Bagshawe*, Q.C., and Mr. *F. Bagshawe*, in support of the application.

Mr. *Ince*, for Messrs. *Keily* and *Cuddon*, the trustees:—

First, the application ought to have been made in the suit of *Taylor* v. *Keily*.

[The MASTER OF THE ROLLS said that if necessary he would give leave to amend the summons in this respect.]

Secondly, the application is wrong in point of substance. Mrs. *Taylor* has no power to grant leases under the will, nor is she a person "entitled to the possession or to the receipt of the rents and profits" within the meaning of the *Leases and Sales of Settled Estates Act*, s. 32.

Mr. *Bagshawe*, Q.C., in reply:—

The words "entitled to the possession or to the receipt of the rents and profits" are a conventional expression used throughout the Act to indicate the beneficial owner of the property: *Grey* v. *Jenkins* (1). Mrs. *Taylor* is the beneficial owner, and upon making application to the Court, would, according to the ordinary practice, be let into possession of the property.

[He also referred to *Tidd* v. *Lister* (2).]

SIR G. JESSEL, M.R.:—

The question which I have to consider is, the proper construction to be put on the 32nd section of the *Leases and Sales of Settled Estates Act* under the circumstances I am about to mention. [His Honour stated the facts, and continued:—]

The result is this, that, so far as I am concerned, the three ladies having died, there is now no question of what is to become of the income during their three lives of the two fifths; and both the two fifths and the three fifths follow the disposition of the will, but they do not follow the same disposition. As to the two fifths, the testator gives merely the net income which he had settled, being two fifths of the net income, subject only to such deductions as they were properly subject to under the will of *James Taylor*. But as regards the three fifths, he orders certain things to be paid which would not be payable out of the two fifths as it seems to me. There are larger words, and there are matters to be paid out of

(1) 26 Beav. 351. (2) 5 Madd. 429.

M. R.
1875
TAYLOR
v.
TAYLOR.
*Ex parte*
TAYLOR.

the three fifths which might not be a charge upon the rents of the property under the will of *James Taylor*, and which would fall to be paid out of the three fifths, and not out of the two fifths, although they related to the matter of the two fifths as well as to the three fifths.

More than that, as I understand it, the gift applies not merely to what the testator took under the will of his father, *James Taylor*, but also to the rest of the income of his own residuary real and personal estate, whatever it might be. It forms one mass, and out of the income so received the trustees are to pay all charges, including the charges and expenses of insurance, repairs, collections, and other necessary outlay. So we have a trust that they shall receive and that they shall pay, not the net rents of a particular house (because, as I understand, they might have applied the rents of one house to the repairs of another house or the insurance of another house), but that they shall pay the net residue, after making all these payments in respect of the whole property, to this lady for her separate use.

Now, the material part of the 32nd section of the Act is this: "It shall be lawful for any person entitled to the possession or to the receipt of the rents and profits of any settled estates for an estate for life," to lease for any term not exceeding twenty-one years, "provided that every such demise be made by deed, and the best rent that can reasonably be obtained be thereby reserved, without any fine, or other benefit in the nature of a fine, which rent shall be incident to the immediate reversion," the demise not to be made without impeachment of waste, and to contain covenants for the payment and receipt of the rent, and such other usual and proper covenants as the lessor shall think fit, and a condition of re-entry. That is, therefore, giving to the person making the demise a very great power of management, because in the case of the trustees being appointed managers by the will, it is enabling the person said to be the beneficial tenant for life not only to lease without their consent, but to impose such terms on the lessee as the tenant for life, or so-called tenant for life, shall think fit. It is a very strong interference, therefore, with the management of the estate, and the question is, whether the Legislature intended that to apply to a case where the tenant for life

was not the manager of the estate. I do not think the Legislature did so intend. In the case I have before me the management is in the trustees. They are clearly, by the express terms of the will, the persons to receive the rents. They are the persons to pay the charges of insurances, repairs, collections, and other necessary outlay, besides the annuities, and so on. Clearly, therefore, as far as the words and the meaning of the will are concerned, they are to have the management, and are to dispose of and apply the net annual income and rents that may be left to the lady, and for her separate use if she should be married. As far as the will is concerned, and as far as the express intention of the testator can be gathered from his words, the trustees are the managers of the estate.

Then it is said, and truly said, that there are certain cases in which, although similar words have occurred in wills, the Court of Chancery has thought fit to put the tenant for life in possession. I agree, but I say that it is subject to the judicial discretion of the Court. It is not the right of the tenant for life to be in possession. The tenant for life is not entitled to the possession, but the Court has a power, notwithstanding similar expressions in a will, to say that, looking to the whole will, the intent can be fully accomplished by putting the tenant for life in possession, taking security from the tenant for life either in the shape of an undertaking (if that should be thought sufficient), or, in some instances, other substantial security, that what remains to be done under the will for the benefit of persons other than the tenant for life, shall be duly performed. The tenant for life in such a case is not a person entitled to possession, but a person who may obtain the possession by judicial process, and to whom the trustees ought not to hand over the possession unless either by the leave of the Court, or, if they choose to act without the leave of the Court, then by taking such security as would indemnify them hereafter for any breach by the tenant for life of those duties which the trustees ought themselves to perform. Therefore, in such a case as I have before me, I am of opinion that this lady is not entitled to the possession.

Then the next point is as to the receipt of the rents and profits. That is the same thing. The trustees are the persons who, by the

M. R. 1875 TAYLOR v. TAYLOR. *Ex parte* TAYLOR.

will, are directed to receive the rents and profits. I agree that I might upon terms take the receipt from them. I might possibly do so even in this case, but then the tenant for life is not entitled to the receipt. She may obtain it through the intervention of the Court, but she is not a person entitled, in my opinion, to the receipt. The very notion that this Act of Parliament was to allow a person entitled to the residue of the rents and profits to take away the management and letting of the estate from the trustees while they remained in actual management and in receipt of the rents, is, according to my judgment, wholly repugnant to the ordinary proceedings of the Legislature in not interfering with the testamentary dispositions of men more than is absolutely necessary. I think the Act has no application, and that there is no power of this sort, and the application must be refused.

Solicitors: Messrs. *Harting & Sons;* Mr. *Keily.*

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M. R. 1875 *May* 28; *June* 1.

## BOTHAMLEY *v.* SHERSON.

[1872 B. 263.]

*Specific Legacy defined—Gift of "all my Stock in the Midland Railway Company"—Wills Act* (1 *Vict. c.* 26), *s.* 24—*Charge on Property specifically bequeathed—Redemption or Compensation.*

Legacies which before the passing of the *Wills Act* would have been specific, remain specific.

A gift of "all my stock in the *Midland Railway Company*" is specific.

A specific legatee is entitled to have his legacy redeemed from charges created by the testator (as distinguished from charges incidental to the property) at the expense of the testator's general estate, or, if the property is not redeemed, to have compensation out of the general estate to the amount of the legacy.

A testator by his will, dated in 1869, made a bequest of "all my shares or stock in the *Midland Railway Company*" to trustees upon certain trusts. He was at the date of his will entitled to £1000 stock in that company. In February, 1871, he transferred the stock into the names of certain bankers to secure an advance made by them to *A.*, who gave the testator an undertaking that the stock should be re-transferred within three months. The testator died in 1872; and after his death the bankers sold the stock (which had never been re-transferred) and applied the proceeds in reduction of the

M. R.
1875
BOTHAMLEY
v.
SHERSON.

debt due from *A.* Under orders made in a suit to administer the testator's estate, *A.* transferred £500 *Midland Railway* stock into Court, but was unable to make any further transfer:—

*Held*, that the trustees of the aforesaid bequest were entitled to the stock so transferred into Court, and not the residuary legatee.

Definition of specific legacy.

*Parrott* v. *Worsfold* (1) observed upon.

THIS was the further consideration of a suit for the administration of the estate of *Thomas Oliver*, who by his will, dated the 2nd of November, 1869, made a bequest as follows:—"I give and bequeath all my shares or stock in the *Midland Railway Company*, and all my *East* and *West India Dock* stock, and my debentures in the *West Shropshire Mineral Railway Company*" unto *Alexander Nowell Sherson*, the Rev. *Thomas Ralph Musselwhite*, and *Thomas Hilton Bothamley*, upon trusts for the benefit of (among other persons) the testator's niece, *Mary Farman*, and her children; and he thereby bequeathed his residuary personal estate to *Alexander Nowell Sherson* and *Thomas Hilton Bothamley* upon trust for *Emily Catharine Oliver* absolutely. The testator made two codicils to his will, dated respectively the 25th of November, 1871, and the 16th of March, 1872, but did not thereby alter or affect the bequest of the *Midland Railway* stock, *East* and *West India Dock* stock, and *West Shropshire Railway* debentures. He died on the 22nd of April, 1872.

The testator was at the date of his will possessed of £1000 stock in the *Midland Railway Company*. In or about February, 1871, the testator, at the request of *Alexander Nowell Sherson*, transferred this sum of stock into the names of Messrs. *Robarts, Lubbock, & Co.*, bankers, by way of security for the repayment of a loan made by them to *Sherson*, who gave the testator an undertaking to re-transfer the stock to the testator within three months of the transfer. At the death of the testator the stock had not been re-transferred, and *Sherson's* debt to Messrs. *Robarts, Lubbock, & Co.* remained undischarged. On the 24th of December, 1873, Messrs. *Robarts, Lubbock, & Co.* sold the stock, and applied the proceeds in reduction of their debt. An order was afterwards made in this cause that *Sherson* should transfer £1000 of such stock, and pay

(1) 1 Jac. & W. 594.

M. R. 1875 BOTHAMLEY v. SHERSON.

the dividends which had accrued thereon into Court by certain instalments; and in obedience to this order *Sherson* transferred £500 stock into Court, but was unable to transfer any further stock, or to pay the dividends.

The general personal estate of the testator was barely sufficient for payment of debts and legacies, and nothing would be coming to the residuary legatee unless the £500 *Midland* stock which had been transferred into Court fell within the residuary bequest; and under these circumstances the question arose who was entitled to that fund.

Mr. *Fischer*, Q.C., and Mr. *T. C. Wright*, for *Emily Catharine Oliver*, submitted that she was entitled to the fund as residuary legatee. The gift of *Midland* stock was not a specific legacy: *Parrott* v. *Worsfold* (1); *Goodlad* v. *Burnett* (2).

Mr. *Millar*, for *Mary Farman* and her children:—

It is quite clear that according to the law as it stood previously to the passing of the *Wills Act*, a gift of "all my stock in the *Midland Railway*" was specific: *Williams* on Executors (3); *Sidney* v. *Sidney* (4); *Smallman* v. *Goolden* (5). The only authority to the contrary is *Parrott* v. *Worsfold*. That case was decided on the theory that the ordinary criterion of a specific bequest is that it is liable to ademption. It is now settled that that is not the true criterion. Thus a bequest (made before the passing of the *Wills Act*) of all the stocks in the public funds of which the testator might be possessed at the time of his death was held to be specific: *Fontaine* v. *Tyler* (6); *Stephenson* v. *Dowson* (7). The nature of the bequest has not been altered by sect. 24 of the *Wills Act*; a bequest which before the passing of that Act was specific is still specific; and the only effect of the Act is to extend the operation of the bequest so as to include property answering to the description, which the testator acquired subsequently to the date of his will and was possessed of at his death. This view of

(1) 1 Jac. & W. 594.
(2) 1 K. & J. 341.
(3) 6th Ed. vol. ii. pp. 1077–1080.
(4) Law Rep. 17 Eq. 65.
(5) 1 Cox, 329.
(6) 9 Price, 94.
(7) 3 Beav. 342.

the Act is that taken by Lord *Hatherley* when Vice-Chancellor in *Trinder* v. *Trinder* (1). Your Honour appears to have also adopted that view in commenting on *Trinder* v. *Trinder* in your judgment in *Morrice* v. *Aylmer* (2). Moreover, the same view has been taken by the Court of Appeal with respect to devises of real estate in *Lancefield* v. *Iggulden* (3).

If, then, this was a specific legacy, the legatees were entitled to have it redeemed by the executors of the testator; and as they did not redeem, the legatees are now entitled to compensation out of the general assets; and consequently the sum of £500 paid into Court must belong to them: *Knight* v. *Davis* (4); *Jarman* on Wills (5).

Further, the testator was at the time of his death entitled to the benefit of a binding contract to re-transfer £1000 *Midland Railway* stock; and I submit that the stock to which the testator was entitled under that contract would pass under a bequest of "all my stock in the *Midland Railway Company*:" *Collison* v. *Girling* (6); *Durrant* v. *Friend* (7); and in this way also the legatees under the bequest in question are entitled to the fund in Court.

Mr. *Fischer*, in reply:—

The bequest in question is not specific. There is no property here on which you can fasten as that which testator intended to bequeath; a specific legacy is that which you can individualise from things of a similar kind. This view is supported by the authority of *Parrott* v. *Worsfold* (8); *Douglas* v. *Douglas* (9); *Goodlad* v. *Burnett* (10); *In re Gibson* (11).

Then it is said that the legatees were entitled to have the stock redeemed at the expense of the estate. But the doctrine on which this contention is founded has never been applied to a case where the charge was not created for the benefit of the testator; nor where the charge exceeded the value of the property charged, as was the case here. If the stock had been redeemed a larger sum

(1) Law Rep. 1 Eq. 695.
(2) Ibid. 10 Ch. 149, n.
(3) Ibid. 136.
(4) 3 My. & K. 358.
(5) 3rd Ed. vol. ii. p. 596.
(6) 4 My. & Cr. 63.
(7) 5 De G. & Sm. 343.
(8) 1 Jac. & W. 594.
(9) Kay, 400.
(10) 1 K. & J. 341.
(11) Law Rep. 2 Eq. 669.

M. R. 1875

BOTHAMLEY v. SHERSON.

would have had to be expended than the value of the stock, and thus neither residuary nor specific legatees would have benefited.

Mr. *Kekewich*, and Mr. *A. T. Watson*, appeared for other parties.

SIR G. JESSEL, M.R.:—

This case is one of some little singularity, and has given rise to a very elaborate argument involving some important points of general law.

The first question is, whether a bequest in these terms, "I bequeath all my shares or stock in the *Midland Railway Company*, and all my *East* and *West India Dock* stock, and my debentures in the *West Shropshire Mineral Railway Company*," unto certain persons upon certain trusts, is a specific bequest.

The first point to consider is, what a specific bequest means; and certainly great discouragement is thrown upon succeeding Judges by Lord *Cranworth's* observations in the case of *Fielding* v. *Preston* (1), in which he said: "There have been attempts in various cases to determine the meaning of a specific legacy, and what is the test whereby such legacies may be distinguished from general bequests. There are objections to most of the definitions, but I think we are quite safe in treating that as a specific bequest which the testator directs to be enjoyed in specie." That is no definition at all; it is simply saying (putting the words "in specie" in English), "that is a specific bequest which the testator directs to be enjoyed specifically." However, notwithstanding that discouragement, I think one may arrive at a tolerably clear idea of what a specific bequest is. In the first place it is a part of the testator's property. A general bequest may or may not be a part of the testator's property. A man who gives £100 money or £100 stock may not have either the money or the stock, in which case the testator's executors must raise the money or buy the stock; or he may have money or stock sufficient to discharge the legacy, in which case the executors would probably discharge it out of the actual money or stock. But in the case of a general legacy it has no reference to the actual state of the testator's property, it being only supposed that the testator has sufficient property which on

(1) 1 De G. & J. 438, 443.

being realized will procure for the legatee that which is given to him, while in the case of a specific bequest it must be of a part of the testator's property itself. That is the first thing.

In the next place, it must be a part emphatically, as distinguished from the whole. It must be what has been sometimes called a severed or distinguished part. It must not be the whole, in the meaning of being the totality of the testator's property, or the totality of the general residue of his property after having given legacies out of it. But if it satisfy both conditions, that it is a part of the testator's property itself, and is a part as distinguished, as I said before, from the whole, or from the whole of the residue, then it appears to me to satisfy everything that is required to treat it as a specific legacy. I hope the definition which I have attempted to give will be more successful than those which have been attempted before, but I can only express that hope with some degree of trepidation.

Now there can be no question, as I understand the authorities, that the part may be defined in any way which distinguishes it. If a testator gives "the black horses which I now have," or "the black horses of which I shall be possessed at the time of my death," or at any other specified time, the gift satisfies the definition of a specific legacy. If authority were wanted, there is plenty. I have been referred to a great many cases, and I will mention on that point one or two. There is the very singular case, to which I shall refer for another purpose, of *Stewart* v. *Denton* (1), where the gift was of "any stock-in-trade of wines and spirituous liquors which I shall be possessed of at the time of my death." That was held to be specific. Again, in the case of *Fontaine* v. *Tyler* (2), Chief Baron *Richards* says, "A gift of all the horses which I may have in my stable at the time of my death, would be specific." Therefore the mere fact of death being referred to as the period for ascertainment does not make the gift less specific; and those cases get rid of the observations made by Sir *Thomas Plumer*, in the case of *Parrott* v. *Worsfold* (3), that a specific legacy must necessarily be subject to ademption. That cannot, of course, be so when the time of the death is the time for the ascertainment;

(1) 4 Doug. 219. (2) 9 Price, 98.
(3) 1 Jac. & W. 594.

M. R. 1875 BOTHAMLEY v. SHERSON.

for a man does not live after his own death, and therefore there is no period at which ademption can take place. It is not necessary therefore that a specific bequest should be subject to ademption.

That being so, the next point I have to consider is, first, whether a gift in the words I have read was specific by the law as it stood before the new *Wills Act;* and secondly, whether it is less specific now. I have no doubt that by the law as it stood before the new *Wills Act* that gift was specific. On that point again there is a great deal of authority. Lord *Alvanley,* in the case of *Kirby* v. *Potter* (1), says, that a legacy "of my stock," or "in my stock," or "part of my stock," is a specific legacy. In the case of *Miller* v. *Little* (2), which is not quite in point, because in it there were a few other words, but nothing very material, it was held that a gift of "my shares in the *Grand Junction Canal and Navigation Company*" was a specific legacy. And in a case before Lord *Thurlow* of *Humphreys* v. *Humphreys* (3), the words were, "All the stock which I have in the Three per Cents, being about £5000," and that was considered specific, although the word "about" was used. There are a great many other cases to the same effect.

There are two cases which at first sight look the other way. One is *Parrott* v. *Worsfold* (4), where the testator gave £1500 Five per Cents, and all other his stocks that he might be possessed of at the time of his death. Sir *Thomas Plumer* held that such a gift was not specific, but he so held on the ground I have mentioned, that he thought you could not have a specific legacy that was not capable of ademption. That, as I have said before, is not a sound ground to take. The other case, which is referred to by Mr. Justice *Williams* in his valuable book on the subject, *Dummer* v. *Pitcher* (5), is not at all in point, but was decided on a totally different ground. It was on this ground, which I take to be perfectly sound law, that where you have the word "my" preceding the gift of the described article, and that followed by a gift of the residue of the estate, there is no intention shewn to sever the article from the rest of the property. The testator was merely enumerating the particulars of which the property con-

(1) 4 Ves. 748.
(2) 2 Beav. 259.
(3) 2 Cox, 184.
(4) 1 Jac. & W. 594.
(5) 5 Sim. 35; 2 My. & K. 262.

sists, and that is the real ground of the decision. Lord *Brougham* says (1): "The general gift to trustees, after specifying the leaseholds, is of all the interest 'of all my funded property or estate of whatsoever kind, or wheresoever the same or any part thereof may be found.' This of itself is sufficiently general, and extends to everything else as well as the funded property." In the case of *Fielding* v. *Preston* (2) there were two gifts: one was of "my leaseholds," the other of "my funded property and other personal estate not hereinbefore bequeathed." Lord *Cranworth* was clearly of opinion that both would have been specific except for the circumstance that the gift "of my funded property" was followed by a gift of all the rest of the estate. His Lordship says (3): "My mind has fluctuated on this point, but at last I have arrived at the conclusion that this is not a specific gift of the funded property; and I come to that conclusion because I think it would be very dangerous to hold that in a will where there is a gift of the residue, and the testator unnecessarily chooses to enumerate some particular things in that residuary gift, such a circumstance was sufficient to constitute the things so enumerated specific gifts. It rarely happens that in the gift of residue something is not mentioned specifically. For instance, a testator may give his horses and all his other personal estate, or his stock in trade and the rest of his personal estate. Such bequests could not, I think, be properly held to be specific. Suppose the will to be worded thus: 'I give to *Henrietta*, her executors, administrators, and assigns, all my other personal estate, including my funded property,' that would not have been specific."

Therefore when you come within that line of cases such gifts are not specific; not because the word "my" would not make the bequest specific, but because it is mere enumeration of particulars making up the residue, and is not intended by the testator to be a gift of part of the property itself to be taken by the legatee in that shape.

I think, then, that it is clearly settled, so far as the old law is concerned, that gifts either "of my shares or stock in a railway company," or "of the stock or shares in the railway company

(1) 2 My. & K. 275. (2) 1 De G. & J. 438.
(3) 1 De G. & J. 444.

M. R. 1875 BOTHAMLEY v. SHERSON.

which I shall be possessed of at the time of my death," or, as it was in *Stewart* v. *Denton* (1), "of all my stock in trade which I shall be possessed of at the time of my death," are specific legacies, and such gifts remain specific legacies, unless the new law has affected the subject.

Now I cannot find anywhere that any Judge has laid down that the new law, which makes a will speak from the time of the death, has altered the law of specific legacies; that it has made that which was a specific legacy before not specific now. The exact contrary is now conclusively settled as regards devises of real estate; and when we consider that there was no substantial distinction between the law of devises of real estate, that is, specific devises, and the law of specific legacies, it would be a surprise to find that the law has been altered. Why should the law be altered? All that the Act says is that the will shall speak from the death. That was always the case as regards general bequests of personal estate; but the same rule did not apply to real estate. The alteration of the law was wanted, not for personal estate, but for real estate. Why, therefore, should an alteration of the law, certainly not pointed to personal estate, alter the nature of specific bequests?

No doubt one class of specific bequests is affected by the Act, namely, the class of specific bequests described as generic, that is, a specific bequest which points to a class of objects given by the testator, and which from their nature would not naturally be referable to the date of the instrument. A good illustration of this class of bequests is a gift "of my household furniture." There are very few persons not *in articulo mortis* who would not expect that some articles of household furniture would wear out, or be broken, or otherwise be parted with, and be replaced by other articles of a similar kind. It would not be natural to assume that a man giving that kind of legacy intended to restrict it to the property of that description which he had at the date of the will. It has been held in *Goodlad* v. *Burnett* (2), and in some other cases to which reference has been made, that in cases of that description the new law brings down the specific bequest to the date of the death; in other words, the new law makes a specific bequest of

(1) 4 Doug. 219. (2) 1 K. & J. 341.

"my furniture" to mean, not "the furniture which belongs to me at the time of making this my will," but "the furniture which shall belong to me at the time of my death." Legacies expressed in both ways were specific before the *Wills Act*, and they equally remain specific now.

On this point there is an authority with which I entirely agree, but which would be binding upon me even if I did not agree with it. In the case of *Lady Langdale* v *Briggs* (1), the question arose whether a gift of "my leaseholds" included leaseholds subsequently acquired by the testator as next of kin of a relative. It was contended that the testator meant the leaseholds he had at the time, and that the gift could not include after-acquired property; that is, the gift being specific as the law stood before the new *Wills Act*, was not enlarged by the operation of the *Wills Act*. On that Lord Justice *Turner* says this (2): "Was the bequest of the leasehold estates contained in the will of the testator specific or general? and if it was specific, are the leasehold estates in question to be held to have been included within it by the operation of the 24th section of the new *Statute of Wills?* Upon the first of these questions, on looking into the authorities, I certainly am not satisfied that this bequest is not specific, though there may be grounds for distinguishing this case"—that is, on the particular wording of the will. "But I think it is unnecessary to give any opinion on that point, for, assuming the bequest to be specific, I am of opinion that the leaseholds in question must be held to be included within it by virtue of the above enactment." He considered that the bequest, if specific under the old law, remained specific, but was enlarged as to its effect by the operation of the enactment, not that the nature of the bequest was altered at all. I think that must have been the opinion of Vice-Chancellor *Wood* also, from his observations in *Trinder* v. *Trinder* (3). I see that I had arrived at that conclusion on a previous occasion, when the case of *Morrice* v. *Aylmer* (4) was before me. On looking again at the case of *Trinder* v. *Trinder*, I think it is impossible to discover any meaning at all in the judgment unless we assume the opinion of the Vice-Chancellor to have been what I have just said, al-

(1) 8 D. M. & G. 391. (3) Law Rep. 1 Eq. 695.
(2) Ibid. 435. (4) Ibid. 10 Ch. 148.

M. R. 1875 BOTHAMLEY v. SHERSON.

though he does not express himself so clearly as the Lord Justice *Turner*.

On that point, therefore, I think it must be considered that the gift, having been specific before the *Wills Act*, still remains specific, and that the nature of the legacy is not at all altered by the new law.

There is only one other point to consider. Supposing the gift to be specific, what was the right of the legatee at the death of the testator? At that time the shares in question were pledged to Messrs. *Robarts & Co.*, not for the testator's own debt, but for the debt of his friend. As I understand the law of specific devises and specific bequests, where a testator has pledged property to secure a debt (and I am not aware that it makes any difference whether he is personally liable or not personally liable for the debt), then as a rule (although there may be exceptions to that rule, as to most others) the legatee has a right to have the specific legacy redeemed out of the testator's general personal estate. On that point the case of *Knight* v. *Davis* (1) was cited, and it is a very strong authority. The then Master of the Rolls, Sir *John Leach*, says: "Where a specific legacy is pledged by the testator, the specific legatee is entitled to have the specific legacy redeemed; and, if the executor fail to perform that duty, the specific legatee is entitled to compensation, to the amount of the legacy, against the general assets of the testator." The word used by Sir *John Leach* is "pledged." He does not say whether pledged for his own debt or pledged for anybody else's debt; and the rule as stated by him, and I apprehend correctly stated, is that the legatee is entitled, not to have it redeemed if pledged for ten times its value for somebody else's debt, but to have compensation if it is not redeemed. If, then, these *Midland* shares were pledged for ten times their value to Messrs. *Robarts*, the executor would have no right to apply the personal estate in redeeming them, but would be bound out of the testator's assets to give compensation to the legatee for the amount of the legacy. Therefore, when you see what the true rule is, there is no room for the argument which was addressed to me with so much force on behalf of the residuary legatee.

(1) 3 My. & K. 358.

This question of a testator's debt came before a Court of Law in the case I have already referred to of *Stewart* v. *Denton* (1). It was argued by very distinguished counsel, and was decided so long ago as 1785. The gift was of "all my stock-in-trade of wines and spirituous liquors which I shall be possessed of at the time of my death." That was held to be specific. The testator died on the 23rd of January, 1780; and on the 22nd of January, the day before his death, eighteen pipes of wine which had been ordered by the testator arrived in the port of *London*, and the arrival of the ship was reported before his death, but the wines in question were not entered or declared until after the testator's death. The plaintiff paid the freight duties and insurance upon the wine without prejudice to the question whether the same should be paid by the specific legatee under the testator's will. The question was raised in a special case whether this was a debt of the testator's which fell upon his executors, or a charge upon the legacy which the legatee must pay before the legacy was enjoyed. Mr. Justice *Buller* asks: "Are the duties payable on the reporting of the ship?" and the answer from the defendant's counsel was that they were payable then. Then the plaintiff's counsel says: "The distinction between the times of reporting and entering was made because the duties are only payable on the entry;" to which Lord *Mansfield* said: "As the goods were imported nobody could by not entering them prevent the duties from becoming due." Then the suggestion made in reply was, that the importation did not make the duties payable, because the testator might re-export the wine. Lord *Mansfield* says: "The question turns on the intention of the testator. It is a very forced construction to suppose that he intended to export the wines." Mr. Justice *Willes* and Mr. Justice *Ashurst* say: "The testator's intention was that the legatees should carry on his trade." Mr. Justice *Buller* says: "He meant them to carry on the trade as he had done, and that intention makes an end of the case. As to Mr. *Baldwin's* distinction, we must presume the duty payable on report, nothing in the case being against it." All the Judges held that where there is a charge on the legacy which the testator would or might have been liable to pay, that is to say, a charge created by the testator as distin-

(1) 4 Doug. 219.

M. R. 1875 BOTHAMLEY v. SHERSON.

guished from a charge incident to the chattel, such as rent payable under a leasehold estate, or (as has since been decided) calls upon railway shares, such a charge is payable out of the testator's estate. In fact the distinction seems to turn on this, is the charge one created by the testator for what has been called a temporary purpose, that is, with the view of raising money or of making use of the property (as in the case of the wines, for the purpose of the testator making use of the wines and getting them to this country), or is it from its nature a charge incident to the property, as in the case of rent on leaseholds or calls payable on railway shares? In the first case the specific legatee is entitled to have the legacy redeemed or freed from the charge. In the second case he is not so entitled, because the testator is supposed to give the thing as it is, and the charge upon it is really not in strictness an incumbrance, but something incident to the nature of the thing.

Therefore in this case it appears to be plain that, following the rule which has been laid down, the specific legatee, being disappointed by the bankers having sold the shares in question, is entitled to compensation to the amount of the legacy against the general assets of the testator. The fund in Court, therefore, will not go to the residuary legatee, but will be subject to the trusts declared by the will with respect to the testator's *Midland Railway* and *East and West India Dock* stock.

Solicitors: Messrs. *Freeman & Bothamley;* Mr. *J. Murray;* Messrs. *Wilde, Berger, Moore, & Wilde.*

## BRIGGS *v.* SHARP.

M. R.
1875
June 3.

[1875 B. 165.]

*Will—Advowson—Direction to sell—Vacant Benefice—Right to nominate.*

Testator, the owner of an advowson, after directing that £13,000 should be invested and the interest paid to his wife for her life for the support of herself and their children, directed his executors when the church was full to sell the advowson, and also certain freehold land, and invest the proceeds for the same purpose as before directed with respect to the sum of £13,000, and after the death of his wife then for the purposes in the will mentioned.

The testator died in September, 1874, the church then being full, and he left his widow and five infant daughters, his co-heiresses-at-law, him surviving. The executors did not sell the advowson, and on the death of the incumbent in February, 1875, the question arose who was entitled to nominate to the vacant benefice :—

*Held*, that the right to nominate was in the widow.

### SPECIAL CASE.

The Rev. *James Briggs*, by his will dated the 23rd of July, 1873, after appointing his wife *Sarah Anne Briggs* and *Thomas Sharp* and *Arthur William Crickmay* joint executors and trustees of his will, and after reciting that he was possessed of the sum of £13,000 which was then lent at interest as therein mentioned, and that he was also possessed of the advowson of *High Halstow* in the county of *Kent*, which was endowed with £800 per annum tithe rent-charge, and to which appertained a rectory-house and glebe land, and was also possessed of two acres of freehold land adjoining the churchyard at *High Halstow* aforesaid, directed that his executors should invest the said sum of £13,000 and pay the interest, dividends, and annual produce thereof to his wife during her life, and for the maintenance and support of herself and her children, and proceeded as follows :—"I direct that if the living become vacant by my death and the advowson have not been previously sold, then and in such case the presentation be offered by my said executors to the Rev. *George Godsell*, but if he have died before the said living have become vacant, or if he refuses to accept the said presentation, then and in either of such cases I direct my said executors to offer the said presenta-

M. R. 1875 BRIGGS v. SHARP.

tion to the Rev. *R. W. B. Marsh*, and if he shall decline the same, then I desire that my said executors shall present to the said living any priest whom they in their discretion may select. And when the church is full, I direct my said executors to sell the advowson thereof, and to invest the proceeds of the said sale in and upon £3 per Cent. Consolidated Annuities, and to pay the interest, dividends, and annual produce thereof unto my said wife in the same manner and for the same purpose as hereinbefore directed in respect of the said interest of the said sum of £13,000 so hereinbefore directed to be invested." And after providing for certain annuities to his children in the event of their marriage, the testator directed that upon the death of his wife the said interest should be paid to his children as therein mentioned, and upon the death of his wife and the last of his children the testator gave the balance of the fund so to be invested to the purposes in his said will mentioned.

The testator died on the 23rd of September, 1874, leaving five infant daughters, who were his co-heiresses at law.

The living of *High Halstow* did not become vacant by the death of the testator, and at the time of his death the church was full.

Upon the testator's death the executors endeavoured to effect a sale of the advowson, but before they could succeed in doing so the rector of *High Halstow* died on the 18th of February, 1875.

The question then arose whether the right to nominate the clerk to be presented to the said living on the avoidance thereof by the death of the last incumbent was vested in the Plaintiff, the testator's widow, or in the Plaintiff jointly with the infant co-heiresses, or in the executors.

Mr. *Macnaghten*, for the Plaintiff, the testator's widow, contended that she, being entitled to the life interest in the proceeds of the sale of the advowson, was the person entitled to nominate the clerk to be presented to the living. He referred to *Hawkins* v. *Chappel* (1).

Mr. *Colt*, for the executors, contended that the right of nomination was in them and not in the widow or in the infant co-heiresses.

(1) 1 Atk. 621.

The case was not within the authority of *Hawkins* v. *Chappel* (1), nor within the cases of *Sherrard* v. *Lord Harborough* (2) and *Martin* v. *Martin* (3).

Mr. *Graham Hastings*, for the infants, contended that, there being no devise of the advowson, it devolved upon the co-heiresses, and that the right to nominate was in them. He referred to *Johnstone* v. *Baber* (4); *Carr* v. *Living* (5); *Lambe* v. *Eames* (6); *Mackett* v. *Mackett* (7).

SIR G. JESSEL, M.R.:—

I think this is a clear case.

The testator was the owner of an advowson. He anticipated, obviously, from the will itself, that the incumbent, who I suppose was an old man, would die in his lifetime, and that it would become valuable. I suppose he bought the advowson with the view of presenting himself, he being a priest in holy orders. By his will he, first of all, gives a sum of £13,000 to his trustees, and directs them to invest it and pay the interest, dividends, and annual produce thereof to his wife, during her life, for the maintenance and support of herself and her children. I am not going to decide now whether there is any obligation upon the wife to maintain the children, or whether these words were used merely to express the purpose which the testator had in view in giving the money to his wife; but this I do decide, that the children do not take as joint tenants with the wife, and that the wife takes the income. He then disposes of the advowson. He does not devise it, which I think he ought to have done; but he uses these words: "and as regards the said advowson, house, and glebe lands, and freehold land, I direct that if the living become vacant by my death, and the advowson have not been previously sold, then and in such case the presentation be offered by my said executors," as in the will mentioned. If the friend whom he mentions refuses to accept it, then he directs that it shall be offered to somebody else: "And

(1) 1 Atk. 621.
(2) Amb. 164.
(3) 12 Sim. 579.
(4) 6 D. M. & G. 439.
(5) 28 Beav. 644.
(6) Law Rep. 6 Ch. 597.
(7) Law Rep. 14 Eq. 49.

M. R. 1875 BRIGGS v. SHARP.

when the church is full"—not full in manner aforesaid—he directs the executors to sell the advowson and two acres of land, and to invest the proceeds of the sale, not only of the advowson, but of the freehold land, in £3 per cent. consols, "and to pay the interest, dividends, and annual produce thereof unto my said wife in the same manner and for the same purpose as hereinbefore directed in respect of the said interest, dividends, and annual produce of the said sum of £13,000."

He died on the 23rd of September, 1874, leaving the incumbent of the advowson in possession. I am told the trustees tried to sell, but could not. That may relieve them from the consequences of a breach of trust; but the incumbent lived till the 18th of February, 1875, so that there was an interval from the 23rd of September, 1874, till the 18th of February, 1875, during which they might have sold the advowson, and certainly they ought to have sold it as quickly as possible, for it is quite obvious by the very terms of the will that the incumbent was not expected to live very long.

That being so, there is a trust with respect to the property. The same observations apply to the freehold land. He directed the trustees to sell, which they had the power of doing, and to invest the proceeds. In this Court that is a gift of the property. A gift of the proceeds of a sale of property is a gift of the property itself. Nothing can be better settled in this Court than that the mere delay of a trustee in converting property does not affect the title of the *cestuis que trust*. A trustee could not, by the exercise of his caprice, or even reasonable discretion as to the time and mode of sale, control the direction of the testator that he shall sell "when the church is full," that is, as soon as possible, and give the proceeds to the *cestuis que trust*. The property is fixed by the testator, and consequently the property, if not sold, belongs to the person or persons to whom the proceeds of the sale are given.

I have asked whether with regard to the freehold land I am compelled to say that if the testator had not devised it, but had simply directed it to be sold, so that the trust, so far as the legal estate is concerned, would have to be carried out by the exercise of a common law power of sale—the co-heiresses at law would be entitled to the estate until the sale. In my opinion, that is not so; the contrary is clearly settled; and in equity the heir-at-law

M. R.
1875
BRIGGS
v.
SHARP.

is a mere trustee for the person to whom the proceeds of the sale are given.

That being so, the co-heiresses at law are not entitled; and it follows that, in my opinion, if the previous part of the will is correctly construed, the widow is entitled. I shall so decide, and in answer to the question say, that the widow is the person I think entitled to nominate a clerk to be presented by the infant co-heiresses.

Solicitors: Messrs. *Smith & Wall.*

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M. R.
1875
*June* 4.

## WAINFORD *v.* HEYL.

[1874 W. 111.]

*Married Woman—Trustee—Separate Estate—Liability for Breach of Trust—Gift of Fund to be applied at Discretion of Trustee for Benefit of Another—Liability to Account.*

The separate estate of a married woman is not in general liable for breaches of trust or torts committed by her.

Where an annuity was given to *A.* in trust to apply the same at his discretion for the benefit of *B.* during his life, and for his advancement, maintenance, support, or otherwise for his benefit, without being answerable for any of the moneys so laid out, or the exercise of the discretion so vested in the said trustee as to the mode and extent of expending and laying out the same:—

*Held*, that *A.* could not apply any portion of the annuity for his own benefit, but was bound to account for all sums not shewn to be applied for the advancement, maintenance, support, or benefit of *B.*

*JOHN CARTHEW*, by a codicil (dated the 8th of March, 1860) to his will, gave and bequeathed to *Susan Collins* and her assigns, but during the life only of *John Wainford*, the yearly sum or rent-charge of £100, in trust to pay and apply the same in her discretion for the benefit of the said *John Wainford* during his life, and for his advancement, maintenance, or support, or otherwise for his benefit, and without being responsible or answerable for any of the moneys so laid out, or the exercise of the discretion so vested in the said trustee as to the mode and extent of expend-

M. R. 1875 WAINFORD v. HEYL.

ing and laying out the same. And the testator charged the said yearly sum or rent-charge on certain real estate of his, and gave to the said annuitant a power of distress, and declared that the receipt of *Susan Collins*, or any other trustee for the time being of the said annuity, should be a full and complete discharge for any quarterly or other payment thereof, and that no person paying the same should be required to see to the application thereof.

The testator made a further codicil (dated the 4th of May, 1860) to his will, and died on the 4th of July, 1860.

Shortly after the death of the testator *Susan Collins* intermarried with *James Heyl*; and upon the occasion of the marriage a settlement was executed, under which Mrs. *Heyl* was entitled to separate estate. After her marriage Mrs. *Heyl*, with the assent of her husband, received the annuity of £100 bequeathed by the will for the benefit of *John Wainford*.

In May, 1874, *John Wainford* (who was born in 1854) filed the bill in this suit against Mr. and Mrs. *Heyl*, alleging that a very small portion only of the annuity of £100 had been applied for his advancement, maintenance, support, or benefit, and praying (amongst other things) for an account of the money received by Mrs. *Heyl* in respect of the annuity and the application thereof; for a declaration that the Defendant *James Heyl* was liable for what might be found due to the Plaintiff in respect of such annuity; and that so far as the estate of *James Heyl* might be insufficient to pay what should be due to the Plaintiff as aforesaid, Mrs. *Heyl* might answer for the same out of her separate estate.

The cause now came on to be heard.

Mr. *Fooks*, Q.C., and Mr. *W. Fooks*, for the Plaintiff, submitted that Mrs. *Heyl* was bound to shew that she had applied the annuity in some manner which she considered to be for the Plaintiff's benefit, and consequently that the Plaintiff was entitled to the account asked for. They further contended that Mrs. *Heyl's* separate estate was liable to make good her breaches of trust, citing *Macqueen* on Husband and Wife (1); *Savage* v. *Foster* (2); *Bar-*

(1) 2nd Ed. p. 136.

(2) 9 Mod. 35.

*row* v. *Barrow* (1); *Clive* v. *Carew* (2); *Vaughan* v. *Vanderstegen* (3); *Hobday* v. *Peters* (4); *Sharpe* v. *Foy* (5); *In re Lush's Trusts* (6). It was well settled that a married woman's separate estate was liable for her general engagements: *Lewin* on Trusts (7); *à fortiori* ought it to be liable for her breaches of trust.

[The MASTER OF THE ROLLS referred to *London Chartered Bank of Australia* v. *Lempriere* (8).]

Mr. *Southgate*, Q.C., and Mr. *Freeling*, contended that, having regard to the nature of the trust in favour of the Plaintiff, the Defendants were not bound to account. The annuity was given to Mrs. *Heyl* subject only to the condition of maintaining the infant, which she had done.

SIR G. JESSEL, M.R.:—

The claim made by this suit arises on a gift of an annuity of £100 to a lady then single, but afterwards married, being a rent-charge of £100 charged on real estate, and given to her in trust to pay and apply the same in her discretion for the benefit of *John Wainford* during his life, and for his advancement, maintenance, or support, or otherwise for his benefit, and without being responsible or answerable for any of the moneys so laid out, or the exercise of the discretion so vested in the trustee as to the mode and extent of expending and laying out the same. On this it has been suggested that the lady is entitled to retain the £100 like a guardian who has that sum allowed for maintenance subject to the condition of maintaining the infant. I cannot so read it. She is entitled simply to receive the £100 and apply it for the benefit of the infant. Whatever she so applies, though she is mistaken as to its being really for his benefit, is not to be charged against her; but, as I read this will, she is not to put one single shilling into her own pocket, or to apply one single shilling for her own use. I shall therefore direct an account of the application of the rent-charge

(1) 4 K. & J. 409.
(2) 1 J. & H. 199.
(3) 2 Drew. 363, 468.
(4) 28 Beav. 354.
(5) Law Rep. 4 Ch. 35.
(6) Ibid. 591.
(7) 6th Ed. p. 627.
(8) Law Rep. 4 P. C. 572.

M. R. 1875 WAINFORD v. HEYL.

of £100, and an inquiry how much thereof has not been applied for the benefit of the infant, and how the sum not so applied has been disposed of.

Then it is said that the lady actually received the annuity after her marriage, it being a legal rent-charge. It appears that she had some separate estate settled to her own use under her marriage settlement; and then it is said, that though the husband became by the marriage the legal owner of the rent-charge, yet if he allowed his wife to receive money which she could only receive as his agent (because he became by the marriage legal owner of the rent-charge), and to apply it for general purposes of the household, or for other purposes, the wife thereby became liable as having charged her separate estate with the amount so received and misapplied. I asked for some authority for that proposition, but no authority has been furnished me. The principle, as I have always understood it, is this: a married woman is liable—or rather her separate estate is liable (for there is no personal liability as far as she is concerned)—to make good all contracts which are made by her with express reference to the separate estate, or which from the nature of the contract itself must be intended to be so referred; but she is not liable even for general contracts which from their nature cannot be so referred; *à fortiori* she is not liable for general torts, but her husband is liable. Her separate estate may be liable for a fraud relating to the separate estate, that is dealing with the separate estate by way of fraudulent representation. Again, the estate may be made liable for an actual appropriation of funds subject to the same settlement and the same trusts which create the separate estate; in other words, the trustees or persons claiming to be entitled to these other funds may say as against the married woman entitled to the separate estate, "You have received by anticipation" (she not being restrained from anticipation) "a part of the separate estate coming to you under that settlement." That, as I understand, is the decision in *Clive* v. *Carew* (1). But apart from such cases as these, one cannot conceive why she should be made liable for general torts in reference to trusts any more than for general torts at law. Strictly speak-

(1) 1 J. & H. 199.

ing she cannot commit torts; they are torts of her husband, and therefore she creates as against her husband a liability. In the case before me it is difficult to understand, if she were in fact a trustee instead of her husband, how the consequence contended for could follow. The husband acts for her, although she remains trustee, just as the husband of an executrix acts for her; and her receipts must be treated as the receipts of the husband, and he alone must be liable. Therefore I cannot see my way to make any decree against her separate property.

M. R. 1875 WAINFORD v. HEYL.

Solicitors: Mr. *John Holder;* Messrs. *Heather & Son.*

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## *In re* AUSTRALIAN DIRECT STEAM NAVIGATION COMPANY.

M. R. 1875 *June* 10.

*Company—Winding-up—Maritime Lien—Mode of enforcing Lien—Proceedings in Admiralty Court—Arrest of Vessel—Sequestration—Companies Act,* 1862 (25 & 26 *Vict. c.* 89), *s.* 163.

The proper mode of enforcing a maritime lien on a vessel belonging to a company which has been ordered to be wound up, is by a proceeding in the winding-up and not by a proceeding *in rem* in the Admiralty Court.

The arrest of a vessel by the Admiralty Court is a "sequestration" within the meaning of the *Companies Act*, 1862, s. 163.

5 C.L.D. 28, 284, 6

ON the 17th of April, 1875, the *Australian Direct Steam Navigation Company, Limited,* was ordered to be wound up, and on the 25th of May a liquidator was appointed.

The company was indebted to Mr. *C. H. J. Baker,* the master of a steamship belonging to the company, and named the *Victoria,* in a sum of £164 for wages. Mr. *Baker* applied to the liquidator for payment of this sum, and upon being refused payment, he commenced a cause of wages in the Admiralty Court with the view of establishing a lien on the *Victoria* for the amount due to him. In this cause the *Victoria* was arrested under an order of the Court of Admiralty.

A motion was now made on behalf of the liquidator that *Baker*

M. R. 1875 *In re* AUSTRALIAN DIRECT STEAM NAVIGATION COMPANY.

might be restrained from further prosecuting the cause, and might be ordered to withdraw all warrants and processes issued by the Court of Admiralty at his instance.

Mr. *Miller*, Q.C., and Mr. *Everitt*, for the liquidator:—

The suit in the Admiralty Court is a proceeding commenced against the company without leave of the Court after a winding-up order had been made, and therefore ought to be restrained under sect. 85 of the *Companies Act*, 1862. If it be said that the proceeding is not against the company but the ship, still, under sect. 163 of the *Companies Act*, 1862, the proceeding would be void. If *Baker* had at the commencement of the winding-up a valid lien on the ship, he may be entitled to be paid his debt in priority to other creditors; but he has no right to enforce it except in the winding-up. If he had not a valid lien at the commencement of the winding-up, then no lien can attach afterwards; therefore, *quâcunque viâ*, the proceedings in the Admiralty Court are wrong.

Mr. *Ince*, for *Baker*:—

The cause of wages is a proceeding *in rem* and not a proceeding against the company, and there is nothing in the Companies Acts to interfere with such a proceeding. The master of a ship has a maritime lien on the ship for his wages: 24 Vict. c. 10, s. 10: *The Bold Buccleugh* (1); *The Mary Ann* (2). This lien springs into existence the moment the circumstances give birth to it, but it must be enforced by proceedings *in rem;* consequently the proceedings in the Admiralty Court were proper. If those proceedings had not been taken, it would have been alleged against the creditor that his title to a lien was not complete.

SIR G. JESSEL, M.R.:—

In my opinion the arrest of a ship is a sequestration within the 163rd section of the *Companies Act*, 1862. The term "sequestration" has no particular technical meaning; it simply means the

(1) 7 Moo. P. C. 267.

(2) Law Rep. 1 A. & E. 8.

detention of property by a Court of Justice for the purpose of answering a demand which is made. That is exactly what the arrest of a ship is; and consequently, as I read the 163rd section, it is void in the case of a creditor who can prove under the winding-up, if the sequestration takes place after the winding-up order has been made, as is the case here. Then the only other point is whether the creditor has a maritime lien independently of the proceedings in the Admiralty Court. Whether those proceedings were necessary to complete the creditor's title, I do not mean to say; but if they were, then his title was inchoate and not complete at the time of the winding-up order, of which he had full notice. If, on the other hand, he had a complete lien before the winding-up order, the proper way of enforcing that lien was by taking out a summons in the matter of the winding-up, and asking that the property subject to the lien might be realized and the proceeds applied in satisfaction of the lien, or else that a sufficient security might be given, so that the amount due to the creditor should be forthcoming. There is no hardship in this upon the creditor. Instead of going to the Admiralty Court he could have applied to this Court by a process at least as cheap and at least as speedy as that of the Admiralty Court. I think the proper order will be that a sum be carried to a separate account in the winding-up to answer the claim, and thereupon all proceedings in the Admiralty Court must be stayed, and the Admiralty Marshal withdrawn from the vessel. I shall not, in any event, allow *Baker* the costs of this motion, as he instituted the proceedings with full notice of the winding-up; but I shall reserve the question of whether he should pay costs until I know more of his claim.

Solicitors: Messrs. *Lowless, Nelson, & Co.;* Messrs. *Ingledew, Ince, & Greening.*

*Applied.* YOUNG *v.* SEALEY. [1949] 1 Ch. 278

M. R.

1875

*June* 12.

## MARSHAL *v.* CRUTWELL.

[1875 M. 152.]

*Husband and Wife—Banking Account in Joint Names—Advancement—Resulting Trust.*

The husband of the Plaintiff being in failing health transferred his banking account from his own name into the joint names of himself and his wife, and directed the bankers to honour cheques drawn either by himself or his wife; and he afterwards paid in considerable sums to this account. All cheques were afterwards drawn by the Plaintiff at the direction of her husband, and the proceeds were applied in payment of household and other expenses. The husband never explained to the Plaintiff what his intention was in transferring the account, but he was stated by the bank manager to have remarked at the time of the transfer that the balance of the account would belong to the survivor of himself and his wife. After the death of her husband (which took place a few months after the transfer) the Plaintiff claimed to be entitled to the balance:—

*Held*, that the transfer of the account was not intended to be a provision for the Plaintiff, but merely a mode of conveniently managing her husband's affairs; and consequently that she was not entitled.

ON the 12th of November, 1874, *Henry Marshal* (who had for some time previously been in failing health, and frequently unable to attend to business) called at the *London and County Bank*, where he kept his banking account. The balance standing to his credit on that day was £980 2*s.* 4*d.*, and he drew a cheque for that amount, and requested the manager to open an account in the joint names of himself and his wife, and to honour any cheques drawn upon the bank either by himself or his wife. He at the same time remarked to the manager (as the manager deposed) that the balance of the account would belong to the survivor of himself and his wife.

An account was accordingly opened by the bank in the joint names of *Marshal* and his wife. The sum of £980 2*s.* 4*d.* was placed to the credit of the account so opened, and considerable sums were afterwards paid in by *Marshal* to the credit thereof. *Marshal* never himself drew any cheques, but his wife by his direction drew cheques, which were duly honoured. The proceeds of the cheques were applied in payment of household and other expenses.

*Henry Marshal* died in April, 1875, having by his will appointed his wife and the Defendant *Crutwell* executrix and executor.

At his death the sum of £1225 0*s.* 2*d.* was standing to the credit of the account. His widow claimed to be entitled to this sum for her own use, and instituted this suit against *Crutwell* and the persons beneficially interested under the will to establish her right.

It did not appear that *Marshal* ever made any statement to the Plaintiff as to his intention in opening the joint account.

Mr. *Bush*, for the Plaintiff, submitted that the Plaintiff was entitled to the fund, citing *Dummer* v. *Pitcher* (1); *Gosling* v. *Gosling* (2).

The MASTER OF THE ROLLS referred to *Fowkes* v. *Pascoe* (3).

Mr. *Marcy*, for the Defendants, was not called upon.

SIR G. JESSEL, M.R.:—

The question I have to decide is one of some importance, because it involves the consideration of what is the rule of law to be followed in cases of this description. The law on the subject has been recently laid down in *Fowkes* v. *Pascoe*, by which I am bound, and from which I must not be understood as dissenting in any way, nor do I suggest that it does not present a rational view of the law, though I am not quite sure whether it agrees with previous decisions. As I understand it, the law is this: The mere circumstance that the name of a child or a wife is inserted on the occasion of a purchase of stock is not sufficient to rebut a resulting trust in favour of the purchaser if the surrounding circumstances lead to the conclusion that a trust was intended. Although a purchase in the name of a wife or a child, if altogether unexplained, will be deemed a gift, yet you may take surrounding circumstances into consideration, so as to say that it is a trust, not a gift. So in the case of a stranger, you may take surrounding circumstances into consideration, so as to say that a purchase in his name is a gift, not a trust.

(1) 2 My. & K. 262. (2) 3 Drew. 335.
(3) Law Rep. 10 Ch. 343.

M. R. 1875 MARSHAL v. CRUTWELL.

Now in the present case the husband, being in failing health, goes to the bank and says, "Change the account from my own name into the name of myself and my wife, and I authorize you to honour the cheques of either of us." The bank manager says (but I cannot rely on loose conversations, of which he has evidently no specific recollection), that he said also, "the balance of the account will belong to the survivor." Whether he said so or not, I think is not very material, because the word "belong" is an ambiguous word, and no real conclusion can be drawn from that.

What afterwards occurred was this:—The man's health not improving he never drew a cheque. His wife drew all cheques against the account, and she applied the proceeds to household purposes, and I suppose small sums to her own use. All the sums afterwards paid in by the husband were carried to the credit of the account in the joint names. Of course the theory is, that not only the sum transferred, but all the sums paid in from time to time, would go to the wife. Now, in all the cases in which a gift to the wife has been held to have been intended, the husband has retained the dominion over the fund in this sense, that the wife during the lifetime of the husband has had no power independently of him, and the husband has retained the power of revoking the gift. In transferring a sum of stock there is no obvious motive why a man should put a sum of stock into the name of himself and his wife. She cannot receive the dividends; he can and must, and it is difficult to see any motive of convenience or otherwise which should induce a man to buy a sum of stock, or transfer a sum of stock (if there is any difference between the two) in or into the names of himself and his wife, except the motive of benefiting her in case she survives. But here we have the actual fact, that the man was in such a state of health that he could not draw cheques, and the wife drew them. Looking at the fact that subsequent sums are paid in from time to time, and taking into view all the circumstances (as I understand I am bound to do), as a juryman, I think the circumstances shew that this was a mere arrangement for convenience, and that it was not intended to be a provision for the wife in the event which might happen, that at the husband's death there might be a fund standing to the credit of the banking account. I take into account the

circumstance that the wife could draw upon the fund in the husband's lifetime, so that it would not necessarily be a provision for her after his death; and also the circumstance that the amount of the fund at his death must be altogether uncertain; and, having regard to the rule which is now binding on me, that I must infer from the surrounding circumstances what the nature of the transaction was, I come to the conclusion that it was not intended to be a provision for the wife, but simply a mode of conveniently managing the testator's affairs, and that it leaves the money therefore still his property.

There will be a declaration that the widow is not entitled to the fund, and the costs will come out of the estate.

Solicitors: Messrs. *Prior, Church, Bigg, & Adams.*

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## ROSS *v.* PARKYNS.



[1871 R. 155.]

*Principal and Agent—Partnership—Underwriting Business—Agreement to share Profits.*

An agreement dated in August, 1864 (previously to the passing of the Act 28 & 29 Vict. c. 86), provided that an underwriting account at *Lloyd's* should be carried on in the name of the Defendant, and the subscription paid in his name; that all policies, losses, and averages should be signed and settled by the Defendant, or by the Plaintiff as his agent; that the Plaintiff should apply the whole or such part of his time and attention to the said business as might be required for conducting the same; that proper books of accounts should be kept by the Plaintiff, he obtaining such assistance from time to time as he might find necessary, subject to the approval of the Defendant; that the Plaintiff should be paid or allowed a salary of £150 by the Defendant; that the profits should be divided between the Plaintiff and the Defendant in the following proportions, viz., that the Defendant should be entitled to four-fifths and the Plaintiff to one-fifth; that if in any one year the business should not yield any profit, but a loss should accrue to the Defendant, then he alone should bear and pay the said loss, and the Plaintiff should be entirely exempt from bearing or paying any part or proportion thereof, and any profit arising from the business of any one year should not be set off against or reduced by the loss in any other year; and that if after the division of profits in any one year any unexpected claim or demand should be made upon the part[illegible], they should advance and pay their

M. R.
1875
Ross
v.
Parkyns.

respective proportions thereof, nevertheless so that the Plaintiff be not called upon to pay any greater sum of money in respect of the business of any one year than the amount of the sum he should then have received as and for his share of the profits in respect of the business for that same year:—

*Held*, that the contract was one of hiring and service, and not of partnership.

ON the 6th of May, 1863, the Defendant, Sir *Thomas George Augustus Parkyns*, commenced carrying on business in his own name as an underwriter at *Lloyd's*, of which the Defendant was a member.

On the 6th of August, 1864 (previously to the passing of the Act 28 & 29 Vict. c. 86), a written agreement was entered into between the Plaintiff, *James Russell Ross* (who was not then a member of *Lloyd's*), and the Defendant, whereby it was recited that the Defendant had been engaged as an underwriter in *Lloyd's*, and that it had been agreed that the underwriting account in the name of the Defendant, which commenced on the 6th of May, 1863, should be continued for three years from that date upon the terms and conditions thereinafter mentioned. These conditions, so far as material, were as follows:—

"(1.) That the underwriting account which commenced on the 6th day of May, 1863, shall continue for the period of three years from that date, and shall be carried on in the name of the said Sir *Thos. Geo. Augustus Parkyns*, and that the subscriptions shall be made in his name only. That the policies, losses, and averages shall and may be signed and settled respectively by the said Sir *Thomas George Augustus Parkyns*, or by the said *J. R. Ross* as his agent.

"(2.) That the said *James Russell Ross* shall apply the whole or such part of his time and attention to the said business as may be required for conducting the same.

"(3.) That proper books of account shall be kept of and relating to the said underwriting business by the said *James Russell Ross*, he obtaining such assistance from time to time as he may find necessary, subject to the approval of the said Sir *Thomas George Augustus Parkyns*, the expense of such assistance to be borne by the said underwriting business. That true and particular entries shall be made in such books of account by the party keeping the

same of all such transactions, matters, and things as are usually written or entered in books of account kept by persons engaged in concerns of a similar nature.

"(4.) That the said books of account, together with all securities, letters, and other things which from time to time shall concern the said business shall remain and be kept and preserved at the counting house where it shall be agreed by the said parties to conduct the business from time to time, and that each of the said parties shall have free access to inspect, examine, cast up, and copy the same without any hindrance or denial of or by either of them.

"(5.) That the said *J. R. Ross* has been paid and allowed a salary or sum of £150 per annum by the said Sir *Thomas George Augustus Parkyns* since the said 6th day of May, 1863, and shall continue to be paid or allowed the said salary or sum of £150 by the said Sir *Thomas George Augustus Parkyns* in each and every year during the residue of the said term of three years, by equal half-yearly payments.

"(6.) That the gains and profits of the said business, after deducting all expenses attending the same, shall be divided between the said parties in the following proportions, namely:—The said Sir *Thomas George Augustus Parkyns* shall be entitled to and have four fifth parts or shares thereof, and the said *James Russell Ross* shall be entitled to the remaining one fifth part or share thereof. And it is hereby expressly agreed and declared that in case in any one or more years of the term during which the said business shall be carried on the same shall not yield any profit, but a loss shall eventually accrue to the said Sir *Thomas George Augustus Parkyns* thereupon during such one or more years, that he shall alone bear and pay the said loss, and the said *J. R. Ross* shall be entirely exempted from bearing or paying any part or proportion thereof, and any profit arising from the business of any one year shall not be set off against or be reduced by the loss in any other year of the said term, but the account for each year shall be closed and settled as one distinct and separate account."

"(7.) That the accounts of the said business for ascertaining the profit or loss accrued thereto or sustained thereby during any one year of the said term shall not be considered as closed or

M. R. 1875 ROSS v. PARKYNS.

settled before the expiration of two years next following the end of that one year, and that the profits arising from the underwriting of the first year of the said term, or any part thereof, shall not be divided before the 1st day of January, 1866, nor the profits of any succeeding year before the expiration of two years next following the end of that year, and that before any division of such profits be made, due provision shall be made for meeting and satisfying any claims which may be then pending against the said parties in respect of the said business, and that if after such division of profits in any one year any unexpected claim or demand shall be made upon or against the said parties, they shall advance and pay their respective proportions thereof, nevertheless so that the said *J. R. Ross* be not called upon to pay any greater sum of money in respect of the business of any one year than the amount of the sum he shall then have received as or for his share of the profits in respect of the said business for that same year."

The business was carried on upon the terms of the agreement down to the 6th of May, 1866; and was afterwards continued, without any further written agreement being entered into, and on exactly similar terms, down to the 31st of December, 1870.

In December, 1871, the Plaintiff filed the bill in this suit, alleging that the business had been carried on by the Plaintiff and Defendant in partnership: and praying that the partnership accounts might be taken, and the affairs thereof wound up under the direction of the Court.

The cause now came on to be heard.

Mr. *Roxburgh*, Q.C., and Mr. *Bradford*, for the Plaintiff, contended that the agreement amounted to a contract by the Plaintiff and Defendant to share profits and losses in the business of underwriters, and consequently that a partnership between them was thereby constituted. It was true that the share of loss to be borne by the ~~Defendant~~ was measured by the profits he had received, but this circumstance did not affect the principle.

Mr. *Chitty*, Q.C., and Mr. *Kekewich*, for the Defendant, referred to *Mollwo, March, & Co.* v. *Court of Wards* (1), *Stocker* v. *Brockelbank* (2).

(1) Law Rep. 4 P. C. 419. (2) 3 Mac. & G. 250.

M. R.
1875
Ross
v.
Parkyns.

Sir G. Jessel, M.R.:—

The question I have to decide is not a question of liability to third persons, but the simple question whether a certain agreement made between the Plaintiff and Defendant is an agreement for hiring and service or an agreement for a partnership. Like every other agreement you must look at the whole of it in order to ascertain its meaning. It is said (and about that there is no doubt) that the mere participation in profits *inter se* affords cogent evidence of partnership. But it is now settled by the cases of *Cox* v. *Hickman* (1), *Bullen* v. *Sharp* (2), and *Mollwo, March, & Co.* v. *Court of Wards* (3), that although a right to participate in profits is a strong test of partnership, and there may be cases where upon a simple participation in profits there is a presumption, not of law, but of fact, that there is a partnership, yet whether the relation of partnership does or does not exist must depend upon the whole contract between the parties, and that circumstance is not conclusive.

Now, let us look at this agreement. It is made between two persons, the Plaintiff and the Defendant. There is not a word about partnership in it from beginning to end. That is the first observation to be made upon it. They are mercantile men, and if they were going to be partners why did not they say so? Then the first clause says that the Plaintiff is to be the Defendant's agent. And the second clause provides that the Plaintiff is to apply the "whole or such part of his time and attention to the business as may be required for conducting the same." That is not conclusive, for you may have a sleeping partner, but it goes in the same direction. Then the third clause is remarkable:—[His Honour read it]. Did any one ever see such a thing in partnership articles? I do not say that such a thing is impossible, but it is very unlikely that one partner would keep the books and accounts, "obtaining such assistance from time to time as he might find necessary," and that "subject to the approval of the other." Then the 5th clause provides that *Ross* is to be paid by Sir *Thomas Parkyns* a salary of £150 per annum in each year. It is called "salary." The term "salary" is a well-known

(1) 8 H. L. C. 268. (2) Law Rep. 1 C. P. 86.
(3) Law Rep. 4 P. C. 419.

M. R. 1875 Ross v. Parkyns.

term. It is what you pay to a servant of the higher class, such as servants of the State, a fixed sum per annum, which is generally called by some other term when paid to servants of a lower class, but which you may call salary in all cases. It is something that you pay your servant. The term "salary," as a rule, is not applicable between partners *inter se*. It is not conclusive, but so far as the common term "salary" is used as being paid by one party to another, that implies that the one is a servant. In this case, the salary is not a sum of money to be paid by way of salary or allowance to a working partner out of the assets, or according to the terms which you find in partnership agreements, "out of the partnership gross profits," but it is to be paid by *Parkyns* to *Ross* out of his own pocket, and there is no means of getting it back again. I think that is very strong evidence that *Ross* was the servant of *Parkyns*.

Then, the 6th clause is this:—[His Honour read it.]

Here it is quite plain that two things were in the contemplation of the parties. First, that loss could not accrue to *Ross*, because it is expressly spoken of as to accrue to *Parkyns*. Next, if it does accrue to *Parkyns* he is not to call upon *Ross* to pay any share of it. The terms are "that if loss shall accrue to *Parkyns*," not "if the business shall be carried on at a loss," and *Parkyns* is alone to suffer any loss. Then the 7th clause provides that the accounts are to be made up in a certain way, and then it says, if after such division of profits in any one year any unexpected claim or demand"—that is anything that they did not anticipate—"shall be made upon or against the said parties, they shall advance and pay their respective proportions thereof, nevertheless so that the said *James Russell Ross* be not called upon to pay any greater sum of money in respect of the business of any one year than the amount of the sum he shall then have received as or for his share of the profits in respect of the said business for that same year." *Ross* is only to be called upon to return any money that he has received as or for his share of profits for that year; that is, he has received a share of profits which are not really profits, because a claim has turned up afterwards, shewing that that what he has received was not profits; but in no case is he to pay back any of his salary.

M. R.
1875
Ross
v.
Parkyns.

It is clear to my mind, looking at the whole of the agreement from beginning to end, that *Parkyns* is the owner of the business, and that *Ross* is his servant. It is not a partnership contract at all, but a contract for hiring and service.

Mr. *Roxburgh* then asked for an account of profits, on the footing of the Plaintiff being an agent.

The Master of the Rolls said that the bill made no case for such decree, which could only be made under special circumstances. The bill must be dismissed with costs, but without prejudice to any action at law or suit in equity which the Plaintiff might be advised to bring or institute to recover his share, or alleged share, of profits.

Solicitors: Mr. *W. Webb;* Messrs. *Freshfields & Williams.*

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## *In re* GLOBE NEW PATENT IRON AND STEEL COMPANY.

M. R.
1875
June 26.

*Company—Winding-up—Inability to pay Debts—Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *s.* 80, *sub-ss.* 1, 4.

A company bought goods, giving in part payment its acceptance, which was dishonoured on presentation, and continued unpaid: and the vendor presented a petition for winding up the company:—

*Held*, that the dishonour of the bill was proof to the satisfaction of the Court under sect. 80, sub-sect. 4 of the *Companies Act*, 1862, that the company was unable to pay its debts, although the Petitioner had not served a demand requiring payment under sub-sect. 1.

A PETITION was presented on the 9th of June, by trade creditors of the *Globe New Patent Iron and Steel Company, Limited*, praying that it might be wound up by the Court.

The Petitioners alleged that they had sold and delivered goods to the company, and had taken in part payment a bill of exchange for £1150, at three months' date, drawn by the Petitioners, and accepted by the company; that the bill became due on the 19th of May, and was dishonoured, and that the amount of it was then due to the Petitioners, with interest and incidental costs, and a

M. R. 1875 *In re* GLOBE NEW PATENT IRON AND STEEL CO.

further sum of £238; that although the Petitioners had repeatedly called upon the company to pay the amount so due it had neglected to pay the same; that the company was in fact insolvent, and unable to pay its debts; and that it was just and equitable, and in the interest of the general body of creditors, that it should be wound up.

There was no other evidence of the debt than the formal affidavit verifying the Petition.

Mr. *Marten*, Q.C., and Mr. *Romer*, for the Petition.

Mr. *Charles Browne*, for the company:—

The debt is disputed. The Petitioners have served on the company no demand for payment pursuant to the *Companies Act*, 1862, sect. 80, sub-sect. 1, and consequently a winding-up order cannot be made: *In re Catholic Publishing and Bookselling Company* (1).

SIR G. JESSEL, M.R.:—

That case appears to me to be rather in the Petitioners' favour. I have no hesitation in saying that sub-sect. 1 has no application to sub-sect. 4. A company may be wound up by the Court whenever it is unable to pay its debts; and by sect. 80 a company is to be deemed to be unable to pay its debts in any of four cases. I think the fourth case includes the other three. The first case is, where a creditor for £50 or upwards has served a demand of payment, and the company for the space of three weeks after service has omitted to pay the debt. The second case is where execution issued upon a judgment has been returned unsatisfied. The third case is under Scotch law; and the fourth case is where it is proved to the satisfaction of the Court that the company is unable to pay its debts. The only question for me to decide is this, whether this is proved to my satisfaction. It appears that the Petitioners sold goods to the company, and took in part payment a bill, which was dishonoured, and continues unpaid. That is proof which ought to satisfy me, and which does satisfy me, that the company is unable to pay its debts. It was argued that the Petitioners are not

(1) 2 D. J. & S. 116. 10 Jur. N.S. 301

M. R.
1875
*In re* GLOBE NEW PATENT IRON AND STEEL CO.

entitled to their order because of the omission to serve the statutory notice demanding payment; but I think their omission to do so has no bearing on the question. *In re Catholic Publishing and Bookselling Company* (1) was a different case. Two points were raised in it, first, whether the Petitioners were creditors of the company at all; and, secondly, whether at the time the petition was presented the company was in such a position as to make a winding-up order proper; and the Lords Justices decided upon the evidence that the company was not unable to pay its debts within the meaning of sect. 80. I make the usual winding-up order.

Solicitors for the Petitioners: Messrs. *Milne, Riddle, & Mellor.*
Solicitors for the company: Messrs. *Minet, Smith, Son, & Harvie.*

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## *In re* ANGLO-DANUBIAN STEAM NAVIGATION AND COLLIERY COMPANY.

M. R.
1875
*June* 26.

*Company—Power to raise Money by issue of Debentures—Issue at Discount.*

By the articles of association of a company the directors were empowered (Art. 28) to borrow money, and (Art. 29) to secure the repayment of or raise any money authorized to be borrowed by them by the issue, on behalf of the company, of debentures, promissory notes, or bills of exchange, or in such other manner as they might deem expedient; and also (Art. 66) to exercise and do all such powers, directions, acts, deeds, and things as the company might exercise and do:—

*Held*, that both under the special power conferred by Art. 29 and the general powers conferred by Art. 66 the directors had power to issue debentures at a discount.

THIS was an application by the *International Society, Limited*, to prove in the winding-up of the *Anglo-Danubian Steam Navigation and Colliery Company, Limited*, on certain bonds of the company for the sum of £18,000 and interest. The articles of association of the company provided as follows:—

(28.) "The directors may from time to time borrow on behalf

(1) 2 D. J. & S. 116.

M. R. 1875

*In re* Anglo-Danubian Steam Navigation and Colliery Company.

of the company any sum of money not exceeding one-half of the nominal capital for the time being of the company.

(29.) "And may secure the repayment of or raise any money authorized to be borrowed by them by mortgage of the undertaking of the company and the future calls of the shareholders, or by either of the above means, or by mortgage, charge, or deposit of the company's property, or of any part thereof, or by the issuing as paid-up or partly paid-up shares any shares of the original or new capital of the company, or by otherwise disposing of such shares as the directors may deem expedient, or by the issue on behalf of the company of debentures, promissory notes, or bills of exchange, or in such other manner as the directors deem expedient."

(66.) "The business of the company, and all matters relating to the company and the affairs thereof, shall be controlled, managed, and regulated by the directors, who may from time to time appoint and remove such superintendent, manager, secretary, engineers, captains, stewards, clerks, and other officers and servants of the company, at such salaries and with such powers and duties as the directors shall think fit, and may appoint and remove the solicitors, bankers, and brokers of the company; and may exercise and do, subject to the regulations of these articles and to the provisions of the *Joint Stock Companies Act*, 1856, and to such regulations as may be prescribed by the company in general meeting, all such powers, directions, acts, deeds, and things which the company might exercise and do; but no regulation made by the company in general meeting shall invalidate any prior act of the directors which would have been valid if such regulation had not been made."

The bonds in question purported to secure £18,000 and interest, but had been issued by the directors at a discount of 25 per cent. The form of the bonds (so far as material to be here stated) was as follows:—

"The *Anglo-Danubian Steam Navigation and Colliery Company, Limited*, acknowledge that they owe to *A. B.* and *C. D.* the sum of £1000, and which sum they agree to pay to them or to their executors, administrators or assigns, on the presentment of this debenture at the registered office for the time being of the company, on the 26th day of June, 1867, and also to pay interest for

the same until that date, for which interest warrants are hereunto attached, at the rate of 6 per cent. per annum, on the 26th day of June and the 26th day of December in each year."

Mr. *Davey*, Q.C., for the applicants, contended that the directors had power to issue debenture bonds at a discount, both under the special powers contained in Art. 29, and also under the general powers contained in Art. 66.

Mr. *Hull*, for the liquidator, contended that there was no power to issue debenture bonds at a discount: *In re Inns of Court Hotel Company* (1).

SIR G. JESSEL, M.R.:—

I have no doubt whatever that these are very good debentures. The directors have these powers. [His Honour read Arts. 28 and 29, and continued:—] The draftsman has evidently inserted the word "raise" to prevent it being contended that the directors could only secure the repayment of money borrowed. He makes a distinction between raising money by giving security for any amount and securing the repayment of money by giving security which is to be limited to the money borrowed. Here the directors raised money by giving debentures for more than the money borrowed. There is nothing in these articles to limit the amount of interest; the directors might give 10 per cent., 20 per cent., or 30 per cent.; and they might give that interest by way of discount. If, therefore, I went on the mere words of the 29th clause, I should hold this was within their powers. But, looking to the 66th clause, I cannot have any possible doubt. The directors can do anything the company can do; and as there are no regulations prescribed by the articles or the company, under the 66th clause they may borrow on any terms they think fit. On both grounds I should be of opinion that they had the power to issue debentures at a discount, and the proof must be allowed.

Solicitors: Mr. *G. M. Clements*; Mr. *James Robinson*.

(1) Law Rep. 6 Eq. 82.

M. R.
1875
June 30.

## WILLS *v.* WILLS.

[1875 W. 105.]

*Will—Gift of Income to Two—Words "at their Death"—Period of Distribution—Shares of Children.*

Bequest of residue, the interest thereof to be paid to *C.* and *J.* equally for their lives, and "at their death" the principal to be divided between the children of *C.* and *J.*:—

*Held*, that the words "at their death" meant "at their respective deaths," and that, on the death of *C.*, the moiety to the interest of which *C.* had been entitled became divisible among his children.

### SPECIAL CASE.

*John Wills*, by his will, dated the 6th of June, 1846, gave the residue of his estate and property to his trustees with the following direction:—"The interest of the residue of my estate vested in the names of the said trustees shall be paid half-yearly to my sons *Charles Thomas Wills* and *John Wills* equally for their natural lives, and at their death the principal to be divided equally between the children of the said *Charles Thomas Wills* and *John Wills*."

The testator died in 1846, leaving his two sons him surviving. *Charles Thomas Wills* died in 1869, leaving five children.

The question arose, as between the children of *Charles Thomas Wills* and *John Wills* and his children, what were their respective interests in the moiety to the income whereof *Charles Thomas Wills* was entitled during his life.

Mr. *F. Thompson*, for the Plaintiffs, the children of *Charles Thomas Wills*:—

Where the income of any legacy is given to two persons as tenants in common, and "on their death" the principal is to be divided among their children, then the children take their parents' share, which becomes at once divisible among them.

In *Arrow* v. *Mellish* (1), where there was a bequest to four nieces to be equally divided, and "at their deaths to go equally

(1) 1 De G. & Sm. 355.

share and share alike to their children," only one of the four had children who survived the testator, and they died. One of the Defendants, *William Crick*, claimed, as their administrator, not only their share, but the three shares of the nieces who died without leaving any children; but it was held that the words "their children" meant their respective children, who were only entitled to their parents' share.

Mr. *Langworthy*, for *John Wills*:—

I contend that on the death of *C. T. Wills* his brother *John Wills* became entitled to the income of the whole fund during his life. Where the income of the *corpus* of a fund is given as a whole between two persons for their lives, as a general rule it is not divisible among the remaindermen till after the death of the survivor.

Thus, in *Malcolm* v. *Martin* (1), where a legacy was given to the children of *G.* and the children of *L.* for life, to be equally divided between them, and at their decease the same was to be divided betwixt the grandchildren of *G.* and *L.*, it was held (*G.* having no children) that the children of *L.* took the whole interest for their lives as joint tenants, and that the grandchildren did not take till after the death of all the children. *Alt* v. *Gregory* (2) was also a case where the distribution of the *corpus* was postponed till after the death of the last survivor of the persons entitled to the income. Here the words "at their death" mean "at the death of the survivor," not "at their respective deaths."

The MASTER OF THE ROLLS referred to *Willes* v. *Douglas* (3), where there was a gift in trust to be equally divided between *A.*, *B.*, and *C.* for their separate use, and at their decease to be divided amongst their daughters, and it was held that on the death of *A.* one-third of the fund was divisible among her children. That was exactly the present case.

Mr. *O. L. Clare*, for the children of *John Wills*:—

I support the contention of the Plaintiff's counsel, so far as he

(1) 3 Bro. C. C. 50. (2) 8 D. M. & G. 221. 2 Jur. N.S. 578

(3) 10 Beav. 47.

M. R. 1875 WILLS v. WILLS.

maintains that the moiety of the fund became divisible on the death of *C. T. Wills*, but I submit it is divisible among the children of both the brothers. In *Abrey* v. *Newman* (1), where there was a bequest to be equally divided between *A.* and wife and *B.* and wife for their lives, after which to be equally divided between the children of *A.* and *B.*, it was held that, on the death of *A.* and his wife, a moiety became divisible equally amongst the children of *A.* and *B.*

In *Sarel* v. *Sarel* (2), where there was a bequest of a moiety of residue to the testator's daughter *A.* for life, and of the other moiety to his daughter *B.* for life, and after the decease of *A.* and *B.* then of all his personal estate to be equally divided between his grandchildren,—on the death of *A.* it was held that the moiety enjoyed by her became immediately divisible amongst the grandchildren.

So, in the present case, it is submitted that the children of *John Wills* are entitled to a share of the moiety; and, further, that the children of the two families take *per capita* and not *per stirpes*.

SIR G. JESSEL, M.R.:—

I might give my judgment somewhat in the words of Vice-Chancellor *Knight Bruce* in *Arrow* v. *Mellish* (3): "I have not a doubt in my own mind of the intention of the testator. The only question seems to be whether I am bound by the decisions in *Malcolm* v. *Martin* (4), *Pearse* v. *Edmeades* (5), and *Smith* v. *Streatfield* (6), to decide in favour of Mr. *Crick's* view of the will. I think that not one of those cases compels me to do so, and I therefore decline doing so."

In the first place, the will makes a provision for the testator's two children primarily, and then for his grandchildren. The natural course would be, under these circumstances, that after the death of either of the children, his children should be provided for. It is, therefore, very unlikely that he intended that there should be no provision for one branch until the head of the other branch should be dead.

(1) 16 Beav. 431.
(2) 23 Beav. 87.
(3) 1 De G. & Sm. 356.
(4) 3 Bro. C. C. 50.
(5) You. 357.
(6) 1 Mer. 358.

The testator gives the income of the residue of his estate to his two sons equally for their lives. That would not give to either of them more than a moiety. Then he proceeds, "And at their death the principal to be divided equally between the children of the said *C. T. Wills* and *John Wills*." That is all. The expression "at their death" cannot be literal. It is impossible the testator could have supposed that both his sons should die at the same moment; and I may repeat the observations of Lord *Langdale* in *Willes* v. *Douglas* (1), that "'at their death' cannot mean the contemporaneous death of all, but the deaths of each respectively." If so, away goes *Malcolm* v. *Martin* (2).

The only other possible interpretation is, "at the death of the survivor," but that gets rid of the word "their." I prefer taking it as "at their respective deaths." There is now no gift of the moiety of the income after the death of either of the sons to anybody. He directs at their death "the principal," that is, the principal of that moiety of which the income is now free, "to be divided equally between the children" of his two sons.

There are two possible constructions. The literal construction will not do. The natural and probable construction is that by the children he means the respective children. This was the view taken in *Arrow* v. *Mellish* (3), where the words "their children" were held to mean "their respective children."

The principal which produced the income which has been set free is to go at once to the children of the son who died, and I so answer the case.

Solicitors: Messrs. *Simpson & Cullingford.*

(1) 10 Beav. 50. (2) 3 Bro. C. C. 50.
(3) 1 De G. & Sm. 355.

M. R.

1875

*June* 24;
*July* 2.

## *In re* BERDAN'S PATENT.

*Patent—Disclaimer—Jurisdiction—Taking off File.*

Where a disclaimer had been filed without the consent of the patentee:—
*Held*, that the Master of the Rolls had jurisdiction without bill filed to order it to be taken off the file:—
Observations on *In re Sharp's Patent* (1).

THIS was a motion on behalf of *H. Berdan*, a patentee, to take off the file a disclaimer, and to remove a fiat which he alleged had been filed and entered without his consent.

On the 13th of October, 1874, application was made to the Solicitor-General on behalf of *Berdan* for leave to file a disclaimer, and leave was given that the disclaimer might be filed subject to certain conditions, which, however, *Berdan* refused to accept, and he declined to sign the undertaking required by the law officer. Subsequently *Berdan's* solicitor ascertained that, without his having given or agreed to give the required undertaking, a fiat had been entered and a disclaimer filed. A disclaimer, with the conditions annexed, was printed at the Great Seal Office.

Mr. *Aston*, Q.C., and Mr. *Crossley*, in support of the motion, submitted that the disclaimer, having been filed without the consent of the patentee, should be taken off the file, and that the fiat should not be entered.

Mr. *Bagshawe*, Q.C., and Mr. *Locock Webb*, Q.C., for the *National Arms and Ammunition Company*, who had opposed the application to the Solicitor-General, contended that the Master of the Rolls had no jurisdiction to comply with the terms of the motion. In the case of *In re Sharp's Patent* (1) it was held that the Master of the Rolls, as keeper of the public records in Chancery, had no jurisdiction to alter anything which a patentee had claimed or disclaimed in his specification, but only to amend verbal or clerical errors.

(1) 3 Beav. 245.

SIR G. JESSEL, M.R.:—

I think I have jurisdiction to entertain the application. The patentee says that the fiat of the law officer was entered and his disclaimer filed without his consent. As no man can disclaim a patent unless by his own consent, it follows that, as this patentee has not consented, there can be no disclaimer, and it appears that this disclaimer was filed under a mistake of fact on the part of the officer whose duty it is to file disclaimers.

The question is, whether the Master of the Rolls has jurisdiction to set this right without bill filed by removing from the record the documents which have been thus filed. There is no authority on the subject. In all other Courts the Judge is the keeper of the records of the particular Court, and exercises a sort of equitable jurisdiction to set such matters right without action or suit. But the Court of Chancery is not a Court of Record, and a Judge in Chancery is not the keeper of the records of his own Court. There is a separate keeper of the records, namely, the Master of the Rolls, who happens also to be a Judge, and I consider that he has power to set matters right in a case of this description.

I may observe that *In re Sharp's Patent* (1) has no direct bearing on this case, as there the application was not to take documents off the file, but to alter an inrolment; and Lord *Langdale* considered that he had no jurisdiction to do more by a memorandum of alteration than to amend some slips or clerical errors.

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July 2. The case, which had stood over, again came on, and an order was made for the disclaimer to be taken off the file.

Solicitors for the Applicant: Messrs. *Lambert & Petch.*
Solicitors for the Respondents: Messrs. *Stibbard & Cronshey.*

(1) 3 Beav. 245.

M. R.

1875

*Jan.* 15;
*July* 3.

## CARLYON *v.* TRUSCOTT.

[1859 C. 172.]

*Will—Charge of Debts on Real Estate if Personalty insufficient—Sale—Notice of Payment of Debts—Vendor and Purchaser.*

20 L.J.Ch. 470
475

A testator by his will, dated in 1858, gave all his real and personal estate to trustees upon trust out of the proceeds of his personal estate, or if and so far as the same should be insufficient then out of the proceeds of his real estate, to pay his debts; and as to a certain house belonging to him, to permit his widow to occupy it during widowhood, and on her second marriage or death to sell the same.

The usual decree for administration was made by the Court, and the Chief Clerk found that all the debts had been paid out of the personal estate. By an order subsequently made on further consideration of the cause, it was ordered (with the consent of the widow, who was still living), that the said house should be sold; and a contract for sale was entered into. The purchaser having objected that a good title could not be made:—

*Held*, that the trustees had no power of sale, and that the objection was valid.

*Forbes* v. *Peacock* (1) explained.

*JAMES TRUSCOTT*, by his will, dated the 4th of September, 1858, gave and devised all his real and personal estate to trustees upon trust out of the proceeds of his personal estate, or if and so far as the same should be insufficient then out of the proceeds of his real estate, to pay his debts and funeral and testamentary expenses; and as to a property called *Essex Lodge*, to permit the testator's widow to occupy the same during widowhood, and after her second marriage or death to sell the same, as therein mentioned.

The testator died in December, 1858, and this suit was instituted shortly afterwards for the administration of his real and personal estate; and the usual administration decree was made. The Chief Clerk's certificate found that all the debts of the testator had been paid out of the personal estate.

By an order made on further consideration on the 14th of January, 1867, it was ordered, with the consent of the testator's widow (who was still living), that *Essex Lodge* should be sold, and a

(1) 1 Ph. 717.

contract was entered into accordingly. The purchaser upon investigating the title raised the objection that there was no jurisdiction to make the order directing a sale; and the question of the validity of the objection was adjourned into Court.

Mr. *W. R. Ellis*, for the purchaser:—

The trust for sale contained in the will arises only after the widow's death; she is still living; consequently the sale cannot be supported on that ground. Neither can a title be made on the ground that the property is charged with debts; for all the testator's debts have been paid.

Mr. *Southgate*, Q.C., and Mr. *Tweedy*, for the Plaintiffs:—

The property is charged with debts; the trustees, therefore, have power to sell; and the purchaser is not bound to inquire whether the debts have or have not been paid: *Forbes* v. *Peacock* (1).

SIR G. JESSEL, M.R.:—

I am sorry to say that I must give effect to this objection. If I had been advising a willing purchaser I should have taken the title and relied on the decree not being disturbed; but when you get a purchaser who wants to sell again immediately, of course he is entitled to take every objection. The gift was a gift of real and personal estate upon trust to pay the debts out of the personalty, and then, if that was insufficient (you must recollect the form of the trust), to pay them out of the real estate. There is, therefore, no trust in the first instance to pay out of the real estate, but only a trust in case the personal estate should prove deficient. It did not prove deficient, and it was proved in the cause long before this sale, and certified, that the debts had all been paid in due course out of the personal estate. Now, though it may be that in cases of this kind the assertion of the vendors that the personal estate is insufficient and that the real estate is wanted for payment of debts, would protect the purchaser, it appears to me that it would have been a plain breach of trust if the trustees had sold the real estate,

(1) 1 Ph. 717.

M. R. 1875 CARLYON v. TRUSCOTT.

not only knowing that the personal estate was sufficient, but knowing it had been applied to a sufficient extent in payment of all the debts. Therefore, as the matter stands, it would be a plain breach of trust to sell any part of the real estate. But as regards this particular real estate the trust is for a lady for life, who is still living, and after her death to sell and divide the proceeds; so that there is a trust for sale of this particular real estate, but not until after the death of the lady who is still living.

On the part of the vendors, reliance was placed on the well-known case of *Forbes* v. *Peacock* (1), and I wish to say, not only am I bound to follow that decision, but it is a decision so old and so much acted on, that were it only a decision of a Court of co-ordinate jurisdiction, I should feel bound to follow it. It is well, therefore, to consider how far it has any application to this case. It appears to me that, rightly considered, *Forbes* v. *Peacock* is a decision in favour of the purchaser. In that case there was a general power to sell for the payment of debts and legacies, but the conveyancer had forgotten to put in what was necessary at that time (though not now) as regards legacies, a power to give receipts; and therefore if the property had been sold for payment of legacies the purchaser would have been bound to see to the application of the purchase-money. The only question Lord *Lyndhurst* was called on to decide was this, had the vendors—in addition to the power of sale, which was conceded—the power to give receipts? Now, in that case, the testator had been dead a long time, and the purchaser heard the debts had been paid, and he asked the vendor, and the vendor refused to give an answer. Upon that Lord *Lyndhurst* says this (2): "The estate being charged in the first instance with the payment of debts the Defendant was not bound according to the general rule to see to the application of the purchase-money. If, indeed, he had notice that the vendor intended to commit a breach of trust and was selling the estate for that purpose, he would by purchasing under such circumstances be concurring in the breach of trust and thereby become responsible." In the present case, inasmuch as the power to sell the real estate is only in case of deficiency of the personal estate, and the purchaser has notice that the

(1) 1 Ph. 717. (2) 1 Ph. 721.

personal estate is ample and that the debts have been paid, he has notice that what is intended to be done is a breach of trust, and therefore he comes under that general statement of the law made by Lord *Lyndhurst*. Then his Lordship goes on: "But assuming that the facts relied upon in this case amount to notice that the debts had been paid, yet as the executor had authority to sell, not only for the payment of debts but also for the purpose of distribution among the residuary legatees, this would not afford any inference that the executor was committing a breach of trust in selling the estate, or that he was not performing what his duty required. The case then comes to this, if authority is given to sell for the payment of debts and legacies, and the purchaser knows that the debts are paid, is he bound to see to the application of the purchase-money? I apprehend not." My understanding of that passage has always been and still is this, that Lord *Lyndhurst* was simply considering whether there was an implied power to give receipts; and that he held that where there was a power to sell for payment of debts and legacies, then, inasmuch as, if the property was sold for payment of debts, there was, under the general rule, an undoubted power to give receipts, the combining of legacies with debts implied also a power to give receipts even if the debts were paid. Then there comes a note by the reporter, in which he puts the case of there being no debts at the testator's death, and it is laid down that that will make no difference, because as that form of trust implied a power to give receipts in the only case in which such a power was wanted, that power would still remain whether the testator paid his debts or not. Therefore, the decision amounted to no more than this, that wherever there was a power to sell for the payment of debts and legacies there was an implied power to give receipts. At the present time, that implied power is no longer wanted. Beyond that, as it appears to me, *Forbes* v. *Peacock* has no application to the case before me.

Therefore, most reluctantly, I am compelled to say it appears to me that the order in question was not warranted by the then state of the family, as the lady was alive, and that the purchaser is entitled to say that he will not accept the title. As I said before, if I had been advising on the title, I think I should have myself

M. R. 1875 CARLYON v. TRUSCOTT.

accepted it and left any person who might choose to do so thereafter to file a supplemental bill to get rid of the order; but as the purchaser has insisted on the objection, I must allow it.

Mr. *Ellis* said that the purchaser only wanted to get a good title, and was willing that proceedings should be taken at his expense to obtain a sale under the *Leases and Sales of Settled Estates Act.*

Mr. *Southgate* referred to *In re Morgan's Settled Estates* (1).

The MASTER OF THE ROLLS directed the summons to stand over in order that a petition might be presented under the *Leases and Sales of Settled Estates Act.*

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July 3. The summons came on again this day along with a petition presented under the *Leases and Sales of Settled Estates Act.*

The MASTER OF THE ROLLS now made an order confirming the contract of sale.

Solicitors: Mr. *Armstrong;* Messrs. *Gregory, Rowcliffes, & Rawle.*

(1) Law Rep. 9 Eq. 587.

## DUKE OF BEDFORD *v.* DAWSON.

M. R.
1875
June 24.

[1875 B. 18.]

*Lands Clauses Act*, 1845, *s.* 68—*Ancient Lights*—*Railway Clearing House Extension Act* (37 *Vict. c.* xvi.)—*Compulsory Powers*—*Injunction.*

By the *Railway Clearing House Extension Act* (37 Vict. c. xvi.), which incorporated the *Lands Clauses Act*, 1845, the Railway Clearing Committee were empowered to take certain lands, and to erect thereon any buildings and works for the purpose of the clearing system. The Plaintiffs, the owners of a neighbouring house, filed a bill to restrain the erection of a building on land acquired under the Act, on the ground that it interfered with their ancient lights:—

*Held*, that the Clearing Committee could not be restrained by injunction, and that the Plaintiffs' remedy was under sect. 68 of the *Lands Clauses Act*, 1845.

THIS was a motion for an injunction in a suit in which the Plaintiffs, the Duke of *Bedford* and his trustees, sought to restrain the Railway Clearing Committee from interfering with the access of light and air to a certain house and workshops in *Bedford Street*.

By the *Railway Clearing House Extension Act* (37 Vict. c. xvi.) it was recited that the Clearing Committee, mentioned in the *Railway Clearing Act*, 1850, required additional building accommodation in proximity to the present clearing house, and that it was expedient that they should be empowered to purchase and take, compulsorily or otherwise, the land or buildings shewn on the plan referred to in the Act, and to erect on such land additional buildings for the purpose of the said Act of 1850; and by sect. 2 it was provided that the *Lands Clauses Acts*, 1845, 1860, and 1869, and certain portions of the *Commissioners Clauses Act*, 1847, were incorporated with and formed part of that Act; and it was by the 3rd section enacted as follows:—"Subject to the provisions of this Act, the Committee may acquire compulsorily or by agreement, and enter upon, take, and hold from time to time all or any part of the land or the buildings therein referred to, and may from time to time pull down all or any of such buildings, and may

M. R. 1875 DUKE OF BEDFORD v. DAWSON.

from time to time erect and maintain on all or any part of the land so acquired any building or buildings, and works incident thereto, for the purpose of the clearing system," with a provision that such buildings should not extend beyond the present line of frontage of the houses to be pulled down, and should not stop up or interfere with *Bedford Street*.

The Clearing Committee took possession of the land under the compulsory powers contained in their Act, and had commenced building thereon.

The house and workshops in *Bedford Street* belonging to the Plaintiffs were opposite to the buildings then in course of erection by the Clearing Committee, and the Plaintiffs claimed to be entitled to ancient lights, which it was alleged would be seriously interfered with by the new buildings. The bill was accordingly filed against the secretary of the Clearing Committee, praying for an injunction to restrain the Defendant, his architects, builders, workmen, and agents, from erecting or continuing to erect the said buildings so as to diminish, interrupt, or obstruct the access of light and air to the Plaintiffs' premises.

The Plaintiffs now moved for an injunction in the terms of the prayer of the bill, and adduced evidence to shew the injury that the new buildings would do to their property, by interfering with the access of light and air.

Mr. *Chitty*, Q.C., and Mr. *Warmington*, for the Plaintiffs:—

The evidence in this case shews that the Defendant's new buildings will most materially interfere with the access of light and air to the Plaintiffs' house and workshops. That, indeed, is not disputed, and the only question is whether the Clearing Committee are authorized by their statutory powers to erect the buildings in question so as to deprive the Plaintiffs of their remedy by injunction.

We submit that the new buildings are in excess of the power given to the Committee by their Act.

It may be said that the proper remedy of the Plaintiffs is under sect. 68 of the *Lands Clauses Act*, 1845, but that section has been held only to apply to cases where injury was occasioned by works

necessarily done under the authority of the Act: *Imperial Gas Light and Coke Company* v. *Broadbent* (1).

The case of *Clark* v. *School Board for London* (2) may be relied on by the Defendants, where a bill was filed to restrain the building of schools by the *London* School Board on land compulsorily taken under the *Elementary Education Act*, 1870, on the ground that they would interfere with the Plaintiff's ancient lights. It was there held that the only remedy was by obtaining compensation under the *Lands Clauses Act*. But that case is distinguishable from the present, as by the Act the School Board were empowered to purchase "any right over land." In the Act affecting the present case these words do not occur. The case of *Macey* v. *Metropolitan Board of Works* (3) was somewhat similar.

In the *Freehold General Land Investment Company* v. *Metropolitan District Railway Company* (4), it was held by Vice-Chancellor *Kindersley* that when the Legislature had authorized works to be constructed by a company, they were bound not only to make compensation, but to take that course in the construction of their works which would do the least possible injury to the neighbouring property.

Even if the Plaintiffs could claim compensation under the *Lands Clauses Act*, still they are entitled to the injunction prayed for by the bill.

Mr. *Southgate*, Q.C., and Mr. *Morris*, for the Defendants, were not called on.

SIR G. JESSEL, M.R.:—

I see no difficulty whatever in this case. The Act of Parliament was passed for enabling the Railway Clearing House Committee to purchase lands by compulsion, and to hold them "for the purposes of the clearing system." The recital is, that it was expedient that the Clearing House Committee should be empowered to purchase, and take compulsorily or otherwise, the

(1) 7 H. L. C. 600, 605.
(2) Law Rep. 9 Ch. 120.
(3) 33 L. J. (Ch.) 377.
(4) 14 L. T. (N.S.) 96.

M. R. 1875 DUKE OF BEDFORD v. DAWSON.

lands and buildings shewn in the plan referred to in the Act, "and to erect on such land additional buildings." What does this mean? If a person is enabled to take lands he does not want parliamentary authority to erect buildings, because any man who is the owner of land may erect buildings provided he does not interfere with the rights of others. Then the 2nd section incorporates the *Lands Clauses Act*, which, by sect. 68, gives to any person whose property is injuriously affected a right to compensation. The 3rd section says: "Subject to the provisions of this Act the Committee may acquire compulsorily, or by agreement, all or any part of the land and buildings referred to, and may from time to time pull down all or any of such buildings"—they do not want authority to pull down except for the purpose of interfering with other people who may have easements or rights of way and water over the lands which would prevent their pulling down otherwise—"and may from time to time erect and maintain on all or any part of the land so acquired any buildings and works incident thereto for the purposes of the clearing system."

Nothing can be plainer; it is a power to erect any building that they think reasonably necessary for the purpose of the same being used for the present Railway Clearing House, so that any building that in their reasonable judgment is required for effecting the purposes of this Act, namely, erecting the clearing house (one of the objects in connection with the railways), is authorized to be erected by them. Now I am asked, with a semblance of argument, to strike those words out of the Act of Parliament, and to say that the power "to erect buildings" was put in for no purpose whatsoever, the only purpose which suggests itself to my mind being that it was to enable them to erect buildings which without parliamentary power they could not erect, namely, buildings which might interfere with the rights of other people.

That being, as I said before, quite plain, the Plaintiffs in effect say, 'The building you are erecting is a very proper building for your clearing house system.' They do not say 'You are erecting a building for the purpose of an hotel or for some other purpose not authorized by your Act,' that would be illegal, the limit of the Act being that the building must be such as would be reasonably

required for the purposes of the clearing system. As far as the Plaintiffs' case is concerned, the Committee could not have exercised a sounder judgment as to the form of building or the nature of it for the purposes of the clearing house system, but they say that erecting it under their powers to erect any building they please that is reasonably required for that purpose, they are obstructing the Plaintiffs' lights, that is to say, they are injuriously affecting the Plaintiffs' houses. The answer is, that is the very thing the Act of Parliament intended by giving the Defendants the power to build, which would not have been wanted at all except for that reason, and if the Plaintiffs are injured they must go in under the provisions of the *Lands Clauses Consolidation Act*, which is incorporated with the Special Act, in order to obtain compensation.

As usual, though the matter is so very clear to my mind on the facts and on the Act of Parliament, it has been embarrassed by a reference to a number of authorities, and I am compelled to construe an authority which is binding on me, being a decision of the Appeal Court, *Clark* v. *School Board for London* (1), to see whether it does or not compel me, as is sometimes the case, to decide a case against my own clear opinion. Upon looking at the authority, I do not think it does, and I think that, properly construed, if a case like this requires support or confirmation, it affords both. The argument, as I understand it, was, that as the School Board for *London* had power to purchase not merely lands, but also a right over lands, they ought not to have proceeded to build the school-house on the adjoining land so as to obstruct the rights of the adjoining proprietor, but should have proceeded to purchase his interest in order to get his right. Nothing could be clearer than the way in which it is stated by Mr. *Lewin* in reply (2) "Under sect. 20 of the Act the School Board have clearly power to buy compulsorily 'any right over land.' We say that they ought to have proceeded under those powers, and to have bought up our right. As they did not they have acted illegally, and must take the consequences." So that the argument there proceeded on the fact that the interpretation clause included these words "right over land;" words which are not to be found in this Act. The whole of the case for the Plaintiff,

(1) Law Rep. 9 Ch. 120. (2) Law Rep. 9 Ch. 122.

M. R. 1875 DUKE OF BEDFORD v. DAWSON.

therefore, in *Clark* v. *School Board for London* is quite out of the way.

But then it is supposed that the judgment shews that if those words had not been there the Court would have come to a different conclusion. Not so. Lord *Selborne* uses these words (1): "It seems to me that the Legislature, in authorizing the School Board, for important public purposes"—put for "School Board," "Railway Clearing Committee," and you have the same thing here—"to exercise these large powers . . . . meant to give them a discretion suitable to the nature and importance of the duties to be discharged by them"—here it is clear it is for the purposes of the Railway Clearing House—"Those duties require that the persons entrusted with them should provide what in their honest judgment would be proper and suitable accommodation for the instruction of the children to be educated." This means that when the words "for the purpose" are used, that does not imply what the Plaintiff or somebody else may think the purpose, or what the Court may think is for the purpose, but it means what the public body entrusted with the power by the Legislature may in their honest and reasonable exercise of judgment think necessary for the purpose. They are to be the judges, subject to this, that if they are manifestly abusing their powers, and purporting to use the land for a purpose for which manifestly it is not intended, the Court will say it is not a fair and honest judgment, and will not allow it. But subject to that limit they are the persons to decide.

The conclusion Lord *Selborne* comes to is as follows (2): "In my opinion the sound view is, that the application, according to the nature of the subject-matter, of the different compensation clauses of the *Lands Clauses Act*, is not meant to be altered by the definition in the special Act, that in the word 'land' is included 'any right over land,' or by the express enactment that the compulsory powers are to extend to rights over land. The general Act contains a scheme of provisions working out the right to compensation, and that scheme of provisions varies according to the subject-matter. In some clauses it is provided that when land is to be taken notice is to be given, and, if that notice is given, then

(1) Law Rep. 9 Ch. 122. (2) Law Rep. 9 Ch. 124.

there is a right to enter upon the land, and no injunction can be granted. But if there is an attempt to enter without notice and without taking the proper steps, then an injunction may be granted. The interference with ancient lights is not a thing which is capable of being entered upon. The word 'entering' is inapplicable to it, and therefore such a section as the 85th is inapplicable to this case." In other words, he looks on the 85th section of the *Lands Clauses Consolidation Act* as being co-extensive with the right to purchase, and consequently when he finds that you are not bound before taking the thing to deposit the purchase-money, he naturally concludes that it is a case within the 68th clause, where you must wait until the injury is done and then get your compensation. That is the way he interpreted this clause.

It appears to me, therefore, that, rightly and carefully considered, the case of *Clark* v. *School Board for London* (1) might have been very well cited on behalf of the Defendants, and not, as it was, on behalf of the Plaintiffs. In my opinion, as I said before, it is entirely consistent with or confirmative of the decision I now come to, if I may use the term "confirmative" with regard to antecedent decisions as applied to an original decision of my own. The motion is refused with costs.

Solicitor for the Plaintiffs: Mr. *Mirams*, agent for Messrs. *King & Du Cane.*

Solicitors for the Defendants: Messrs. *Twisden, Parker, & Co.*

(1) Law Rep. 9 Ch. 120.

V.-C. M.

1875

*April* 19.

## *In re* WELSH FLANNEL AND TWEED COMPANY.

*Winding-up—Appointment of Liquidators—Notice of Meeting—Interest on unpaid Calls.*

After a winding-up resolution has been passed liquidators may be appointed at a meeting without special notice of the intention to propose their appointment.

Provisions in articles as to interest on calls do not apply to calls made by liquidators.

THIS was an adjourned summons taken out by the liquidators of the *Welsh Flannel and Tweed Company, Limited*, that the contributories might be ordered, by a day to be named, to pay into the *Bank of England* to the account of the liquidators the several sums set against their names, being the amount due from them in respect of calls made upon them, and interest upon such calls; with such costs as might be directed.

The company was formed in 1863 for the purchase and working of a business formerly carried on by Mr. *J. Haywood Williams* at *Welshpool*, for the manufacture of Welsh flannels and Tweed. An agreement was entered into by Mr. *J. H. Williams* for the sale by him to the company of the freehold flannel manufactory, mill, outbuildings, and about two acres of land at *Welshpool*, together with the machinery and plant, for the sum of £5000, one half to be paid in cash, and the other half in 250 fully paid-up shares of the company; and the company was to take the stock at a valuation.

The capital of the company was to be £20,000, divided into 2000 shares of £10 each.

The company took possession of the manufactory and commenced to work it when nothing more than the deposit of £1 per share on about 700 shares had been paid. A call of £2 per share was made by the board on the 12th of October, 1864; but no response was made to this call up to the 9th of March, 1867.

An extraordinary meeting of the shareholders was held on the 9th of March, 1867, in pursuance of a notice that it was the intention of the directors to propose a resolution for the voluntary

winding-up of the company; and at that meeting a resolution was passed that the company be forthwith wound up voluntarily in such manner and upon such terms and conditions as the board of directors should think fit.

At a second extraordinary meeting the same resolution was confirmed.

At another meeting of shareholders, held on the 3rd of April, 1867, the notice for holding which made no mention of the intended appointment of liquidators, Messrs. *E. R. Morris*, *Thomas Rutter*, and *John Morris* were appointed liquidators. The liquidators proceeded with the business by getting in the call of £2 per share made in 1864; and they also made another call of £3 per share on the 9th of May, 1867.

After some difficulty, and after the commencement of legal proceedings against many of the shareholders, the call of £2 per share was paid; but the call made by the liquidators of £3 per share had not yet been paid by any of the shareholders.

The liquidators had paid most of the small debts due from the company, and they had now £800 in hand, and had been pressed by Mr. *J. H. Williams*, who had received only £500 on account of the purchase of the factory and stock, to enforce payment of the £3 call, and to pay him a further portion of the amount due to him, but the liquidators hesitated to take legal proceedings for its recovery, on account of doubts having been raised as to the validity of their appointment as liquidators of the company.

Mr. *Glasse*, Q.C., and Mr. *Graham Hastings*, in support of the summons:—

The shareholders are now called upon to pay up the amount due from them for a call made by the liquidators in 1867. The reason of the delay in enforcing payment was a doubt whether the appointment of the liquidators under the voluntary winding-up was strictly legal in point of form, in consequence of many of the persons who voted at the meeting not having paid up the calls then due from them; but this doubt has been removed by the supervision order, and there can now be no valid defence by which the shareholders can avoid payment of the amount due from them. The only question that can be suggested is as to the amount of

V.-C. M. 1875 *In re* Welsh Flannel and Tweed Co.

interest to be charged upon the unpaid calls. This is settled by the articles of association of the company. Under the 95th section it is provided that all calls shall be made at the discretion of the directors, but no call should exceed £2 per share; and the 97th section directs that after fourteen days' non-payment of any call, notice of the call shall be repeated, and after fourteen days' further non-payment thereof the company may sue the defaulting shareholders for the amount unpaid, which shall carry £10 per cent. per annum interest from the day appointed for payment thereof. The necessary notices provided by this section were given, and the liquidators had power to call up £3 per share, although the directors could not have done so.

It was decided in *Ex parte Lintott* (1) that the terms of the articles of association entered into by the shareholders upon the formation of the company were binding upon them in the winding-up, and that although the articles contemplated calls being made by the directors, still, as the calls could no longer be made by the directors, the same provisions applied to calls made by the liquidators. That decision was in effect confirmed in *Barrow's Case* (2) by the Court of Appeal, where it was held that the statute 3 & 4 Will. 4, c. 42, was applicable, and that interest at £5 per cent., which was the amount claimed in that case, was payable from the day named in the notice of call. These cases are cited in *Buckley* on the Companies Acts (3).

If, therefore, the call was duly made upon the shareholders, then it follows they were bound to pay interest on the unpaid calls at the rate of £10 per cent. so long as it was unpaid. This fully meets the justice of the case, for it was owing to the shareholders not having paid their calls that the expense and delay of these proceedings have been caused. They ought, therefore, to be made responsible for the expenses they have caused.

Mr. *J. Pearson*, Q.C., and Mr. *Millar*, for the contributories:—

First, we say that the appointment of the liquidators under the voluntary winding-up was altogether invalid, and consequently they had no power to make any call; and, secondly, we say that

(1) Law Rep. 4 Eq. 184. (2) Law Rep. 3 Ch. 784.
(3) 1st Ed. p. 124.

there can be no interest upon unpaid calls at the rate of £10 per cent. The liquidators can only demand interest at £5 per cent. from the date of any call made by them after the supervision order.

The objection to the validity of the appointment of the liquidators is that no notice was given to the shareholders of a meeting at which liquidators would be appointed. The first general meeting was held on the 9th of March, 1867, in pursuance of a notice that at such meeting a resolution would be proposed for the voluntary winding-up of the company, but no notice was given that liquidators would be appointed. At that meeting a resolution was passed to wind up the company voluntarily, in such manner and on such terms and conditions as the board should think fit. This was not a resolution to wind up voluntarily within the 129th section of the *Companies Act* of 1862, and there was consequently no power to appoint liquidators. It was in fact a resolution to dissolve the company under the powers given by the articles of association. The resolution was subsequently confirmed at a second meeting of the shareholders, but the liquidators were not appointed till a third meeting was held, on the 3rd of April, 1867, and no notice that such appointment was intended to be made was ever given to the shareholders. This question is settled by the decision of Vice-Chancellor *Kindersley* in *Re Stearic Acid Company* (1), where it was held that the advertisement of the meeting to wind up voluntarily not having stated that an official liquidator was to be appointed, his appointment was invalid.

In the case of *In re Bridport Old Brewery Company* (2) it was held that a resolution was invalid as an extraordinary resolution under the *Companies Act*, 1862, s. 129, because the notice did not shew distinctly that such resolution would be proposed. Lord Justice *Turner* there said it was of great importance that the steps taken in a matter of such consequence as the resolving to wind up a company should be perfectly regular, and that if the proceedings were not regular, the liquidators could enforce no payment of calls, or do any other acts legally under the winding-up.

[Mr. *Glasse* referred to the case of *Oakes* v. *Turquand* (3), and

(1) 11 W. R. 980. (2) Law Rep. 2 Ch. 191.
(3) Law Rep. 2 H. L. 325.

V.-C. M. 1875 *In re* Welsh Flannel and Tweed Co.

read the following passage from Lord *Chelmsford's* judgment (1): "The necessary consequence of a voluntary winding-up being the appointment of liquidators, I am disposed to think that they may be appointed at the same general meeting at which the resolution for voluntarily winding up is passed, without special notice."]

The observation of Lord *Chelmsford* in that case is a mere *dictum*. It was not necessary to decide the question there, and such a *dictum* cannot have any weight against the distinct authority of the two cases above cited.

In *Buckley* on the Companies Acts, although these cases are cited, the principle is stated in these words (2): "Notices must comply strictly with the provisions of the Act in respect of which they are issued, and if at any meeting it is proposed to pass a resolution in favour of proceeding under any particular provisions of the Act, the notice must clearly give the shareholders to understand that it is intended so to proceed." If the appointment of the liquidators was invalid, no subsequent supervision order will cure the defect, and the acts done by the liquidators so appointed are void. This is shewn by the case of *In re Bridport Old Brewery Company* (3).

Then as regards the amount of interest upon the calls, we do not admit that the calls were legally made, and consequently no interest could be demanded, but, under any circumstances, £10 per cent. interest could not be charged. The sections of the articles of association apply only to calls made by the directors, and not to a call made by the liquidators. The directors had only power to make calls of £2 per share, whereas this is a call in the winding-up of £3, which is a totally different thing, and has no reference to the provisions under the articles of association.

In *Ex parte Lintott* (4) there was a note attached to the notice of call, distinctly stating that should the call not be paid interest would be charged thereon at the rate of £5 per cent. per annum. By that the shareholders were warned that they would have to pay interest, but no such notice was given when these calls were

(1) Page 355.
(2) 1st Ed. p. 111.
(3) Law Rep. 2 Ch. 191.
(4) Ibid. 4 Eq. 184.

made. Besides, the interest there demanded was no more than the ordinary rate which might fairly be required of shareholders who failed to pay at the same period that other shareholders paid their calls. In this case none of the calls have been paid. The shareholders in that respect stand upon the same footing, and as no proceedings were taken to compel payment for so many years, they might fairly have supposed that the liquidators considered they had no power to enforce payment. This was, no doubt, the real cause of the delay on the part of the liquidators, and it would be most unjust, under the circumstances, that the shareholders should now be compelled to pay interest at the rate of £10 per cent.

Mr. *B. Rogers* appeared for the creditors.

Mr. *Graham Hastings*, in reply, was only called upon to argue the question as to the rate of interest to be charged.

Sir R. Malins, V.C.:—

This case is by no means free from difficulty. The question is, What are the rights of the parties in respect of the calls made on the 9th of May, 1867? The company was formed for working a small business for the manufacture of Welsh flannel at *Welshpool*. Finding themselves unsuccessful in their undertaking, they determined upon winding up the concern. All parties deserve severe reproach for allowing the matter to go on for so long a period as eight years without completing the liquidation. However, it was by the concurrence of all parties that the winding-up took place. The resolution to wind up voluntarily was passed in April, 1867, and the voluntary liquidators made the call now in question for £3 per share on the 9th of May following. It is now said that this call was invalid because the liquidators were not duly appointed, and the argument has been that although notice was given of the meeting to be held for the purpose of determining whether there should be a winding-up of the company, no notice was given of the intention to propose the appointment of liquidators; therefore it has been urged that it is a fatal defect in the title of the liquidators, and everything they have

V.-C. M. 1875 *In re* Welsh Flannel and Tweed Co.

done has been invalid, and consequently that this call is invalid. In support of this contention, the case of *Re Stearic Acid Company* (1) has been cited. Upon looking at the case I stated that the decision did not commend itself to my judgment so much as most of the decisions of Vice-Chancellor *Kindersley*, because, it being impossible that a company should be wound up without the appointment of liquidators, I think the notice of the meeting to pass a resolution to wind up would necessarily carry with it a notice that liquidators would be appointed. I cannot, therefore, concur in that decision, and I find that in the case of *Oakes* v. *Turquand* (2) Lord *Chelmsford* used this expression: "The necessary consequence of a voluntary winding-up being the appointment of liquidators, I am disposed to think that they may be appointed at the same general meeting at which the resolution for voluntarily winding up is passed, without special notice." That case was decided in August, 1867, and I find that the case of *Re Stearic Acid Company* was cited before the House of Lords. They consequently had their attention drawn to the decision of Vice-Chancellor *Kindersley*, and if they had acquiesced in it Lord *Chelmsford* would certainly not have made this observation (3): "The 133rd section of the *Companies Act*, 1862 (under which the notice was given), enacts that certain consequences shall ensue upon the voluntary winding-up of a company, and amongst them that liquidators shall be appointed for the purpose of winding up the affairs of the company and distributing the property." Now as this had not been done in that case, it was not necessary for Lord *Chelmsford* to say positively; but after *Re Stearic Acid Company* had been cited, it was very important for the House to explain their view of the law, and when Lord *Chelmsford* said he was disposed to think that liquidators might be appointed at the general meeting to wind up without special notice, I must conclude that if he had been called upon to decide the question then, he would have decided that liquidators might be so appointed. I am now called upon to decide a similar question, and I think that what Lord *Chelmsford* was disposed to think, is the right way of viewing it—that, as the company cannot be wound up voluntarily without

(1) 11 W. R. 980. (2) Law Rep. 2 H. L. 325, 355.
(3) Law Rep. 2 H. L. 355.

appointing liquidators, a notice that liquidators will be appointed, without which the company cannot be wound up, is involved in the notice of a resolution for winding up. That objection, therefore, I consider unsustainable; and I think if Vice-Chancellor *Kindersley* had had to consider the question at a later period, he would have come to a different conclusion. At all events, I consider that I am bound by the case in the House of Lords.

Another reason for disallowing this objection is, that it is taken at far too late a time. I find here a body of gentlemen present at the meeting, including those who were appointed liquidators—in fact all the parties were present; and, independently of the objection as to the invalidity of the appointment, I consider that the objection is taken too late, and I cannot agree to the acts of the liquidators being rendered invalid and set aside on account of the manner in which they were appointed. I must, therefore, consider the call to have been valid.

It is not, however, so much for the purpose of setting aside the call that this summons has been opposed, as for the effects of it, by which a large arrear of interest would have to be paid, because it is admitted that a call of £3 per share would have now to be made. The question really is as to getting rid of this payment of interest. Now what was the effect of the call? It has been argued that the consequence must follow that there must be payment of interest, not at the rate of £5 per cent., but at the rate of £10 per cent. Then is it to be £5 per cent. or £10 per cent. interest? The argument is, that £10 per cent. should be charged, because it is provided by the 95th and following clauses of the articles of association, first, "that all calls in respect of shares shall be made at the discretion of the directors, and a call shall be deemed to be made at the time when the resolution authorizing it is passed by a board; but no call shall exceed £2 per share;" and then by the 97th clause, "That after fourteen days' non-payment of any call in respect of any share, notice of the call shall be repeated, and after fourteen days' further non-payment thereof the company may sue the defaulting shareholders for the amount unpaid, which shall carry £10 per cent. per annum interest from the day appointed for payment thereof."

Now that section applies to a call made by the directors, which

V.-C. M. 1875 ~~ *In re* WELSH FLANNEL AND TWEED CO.

must not be more than £2 at a time, and this is not a call by the directors, but by the voluntary liquidators, who made a call of £3 per share at once, which it was not in the power of the directors to do.

It is true that in *Ex parte Lintott* (1) I intimated an opinion that none of the articles of association were abrogated by the winding-up; but I think, if in that case it had been provided that £10 per cent. interest should be charged, I should have more carefully considered the question. I think that justice required the payment of £5 per cent. for interest; but there are various reasons in this case why £10 per cent. ought not to be paid. There has been very gross negligence in this case; there is only one creditor now left, namely, the bankers to whom the debt of the vendor of the property was assigned, and no notice was given by them of their charge for six months. All parties allowed the matter to sleep for a considerable time, and on every principle of equity it would be unjust through this course of negligence that the persons on whom the call was made should have to pay £10 per cent. interest upon their calls. I think the articles of association do not apply to calls made by the liquidators; and further, that they ought to have given notice that interest at £10 per cent. would be required from those who did not pay up their calls. Still I am of opinion that some interest ought to be paid, yet I do not think it just that £10 per cent. should be charged.

What rate, then, ought to be paid upon these calls? I think that the case comes within the principle of *Ex parte Lintott*, which, though not appealed from, was in fact affirmed in *Barrow's Case* (2). There I decided that the notice that interest would be charged came within the 28th section of 3 & 4 Will. 4, c. 42, and interest should be paid at the rate of £5 per cent. Under the circumstance of there being no intimation given to the shareholders what interest would be required, I think the only rule that can be applied to this case is, that the usual interest of £5 per cent. should be allowed, and that will be from the 1st of July, 1867, when the calls were to be paid.

Then as to costs, I think that, considering the negligent way in which the affair has been managed by all parties up to the period

(1) Law Rep. 4 Eq. 184. (2) Law Rep. 3 Ch. 784.

when it was placed in the present hands, in the year 1871, justice will be done by making the costs of all parties costs in the winding-up.

V.-C. M. 1875 *In re* WELSH FLANNEL AND TWEED CO.

Under this decision it will, of course, follow that if there are any parties who have paid interest at the rate of £10 per cent., they will be entitled to have a proportionate part returned to them.

Solicitors in support of the summons and for the Liquidators: Messrs. *Tilleard, Godden, & Holme.*

Solicitors for the Contributories: Messrs. *Jones, Blaxland, & Son.*

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## *Ex parte* GOVERNORS OF ST. BARTHOLOMEW'S HOSPITAL.

V.-C. M 1875 *May* 28.

*Practice—Lands Clauses Act—Reinvestment—Costs—Apportionment between several Parties.*

The rule that the costs of a reinvestment in land of funds paid into Court under the *Lands Clauses Act* by different bodies as the compensation money for land taken are to be borne equally by the different bodies does not apply where there is great inequality in the amounts of the different funds, but the costs will in that case be apportioned rateably between the different bodies.

*Ex parte Bishop of London* (1) considered.

THIS was a Petition for the reinvestment in land of certain funds in Court belonging to the mayor, commonalty, and citizens of the city of *London*, as the governors of *St. Bartholomew's Hospital*, which had been paid in under the following circumstances:—

In the year 1864 the *London, Chatham, and Dover Railway Company* took certain land belonging to the hospital for the purposes of their undertaking, and paid into Court, as the purchase and compensation money, a sum which when invested was represented by £11,834 19*s.* 1*d.* consols.

Under the *Metropolitan Meat and Poultry Market Act*, 1860, the Corporation of *London* took other land belonging to the hospital,

(1) 2 D. F. & J. 14.

V.-C. M. 1875

*Ex parte* GOVERNORS OF ST. BARTHOLOMEW'S HOSPITAL.

and paid into Court, as the purchase and compensation money, a sum which when invested was represented by £1677 8*s.* 4*d.* consols.

Under another Act the Corporation took other lands of the hospital, and paid into Court, as the purchase and compensation money, a sum which when invested was represented by £3934 8*s.* 6*d.* consols.

Under the *Metropolitan Railway Act*, 1854, other lands of the hospital were taken by the *Metropolitan Railway Company*, and the purchase and compensation money was paid into Court and reinvested. A portion, however, of this fund was afterwards sold out for the purpose of a reinvestment in land, and there now remained on this account the sum of £1295 14*s.* 9*d.* consols.

Under the provisions of the *Post Office Extension Act*, 1865, other land belonging to the hospital was taken, and the purchase-money paid into Court and invested. A portion of this fund was also afterwards laid out in a reinvestment in land, and there now remained in Court on this account £5914 17*s.* 9*d.* consols.

Under the provisions of the *Midland Railway Extension to London Act*, 1863, and the *Midland Railway New Lines Additional Powers Act*, 1865, the *Midland Railway Company* took other land belonging to the hospital, and paid the purchase-money into Court. A portion of this fund was afterwards laid out on a reinvestment in land, and there now remained on this account £17,952 7*s.* 7*d.* consols.

The Corporation, as governors of the hospital, had recently entered into a conditional contract for the purchase of certain land for £25,000, and proposed to apply in payment of the purchase-money the whole of the four first-mentioned funds, and so much of the fifth as should be necessary to make up the requisite sum.

The Petition was accordingly presented for the purpose of obtaining the sanction of the Court to this purchase, and it was proposed that the *London, Chatham, and Dover Railway Company*, the Corporation of *London*, the *Metropolitan Railway Company*, the Postmaster-General, and the *Midland Railway Company*, should pay the costs equally, except as to the *ad valorem* stamp, which should be paid rateably to the amount of the purchase-money contributed from each source.

Mr. *A. T. Watson*, for the Petitioners.

Mr. *Farwell*, for the *Metropolitan Railway Company*:—

The rule is now settled that where there is great inequality in the amounts to be contributed by the different bodies who have paid the money into Court, the costs will be divided rateably to the respective amounts of the funds.

This was decided by a case of *Ex parte Dean and Chapter of Christ Church, Oxford*, which came before your Honour on the 8th of November, 1872. Your Honour then followed *Ex parte Christ Church* (1) in preference to *Ex parte Bishop of London* (2).

Mr. *Beale*, for the Postmaster-General, took the same view.

Mr. *S. B. L. Druce*, for the *London, Chatham, and Dover Railway Company*:—

*Ex parte Bishop of London* was treated by the Lords Justices as the binding authority in *In re Leigh's Estate* (3).

Mr. *Brunskill Cooke*, for the Corporation of *London*.

SIR R. MALINS, V.C.:—

The general rule as to costs is unquestionably that which was laid down in *Ex parte Bishop of London*. But, in consideration of the hardship and injustice which would arise in cases of great inequality in the amounts contributed from the different sources Vice-Chancellor *Stuart*, in *Ex parte Christ Church*, directed that the costs should be borne in proportion to the amount contributed. I think that the rule ought to be applied wherever there is any considerable inequality, as is the case here.

Solicitors: Messrs. *Wilde, Berger, Moore, & Wilde*; Messrs. *Burchell*; Mr. *E. R. Keele*; Messrs. *Beale, Marigold, & Beale*.

(1) 9 W. R. 474.
(2) 2 D. F. & J. 14.
(3) Law Rep. 6 Ch. 887.

V.-C. M. 1875 June 11.

## *In re* WOOD'S SETTLED ESTATES.

*Practice—Leases and Sales of Settled Estates Act—Payment out of Court—Tenant in Tail—Disentailing Deed unnecessary.*

1 Ch. D. 438

No disentailing deed is required on payment out of Court under the *Leases and Sales of Settled Estates Act* of a fund to a party who would have been in the position of a tenant in tail of the land represented by the fund.

Barlow v. Reynolds 3 Ch. D. 814

THIS was a Petition for payment out of Court of a fund representing the proceeds of the sale of real estate devised by the will of *Samuel Wood*, and paid into Court under the *Leases and Sales of Settled Estates Act*.

Under the will one of the Petitioners was tenant in tail of one undivided sixth part of the estate represented by the fund, and no step had been taken for barring the estate tail.

Except for the entail as to this share the Petitioners were absolutely entitled to their portion of the fund.

Mr. *Langworthy*, for the Petitioners:—

When a tenant in tail is entitled to money paid into Court under the *Lands Clauses Consolidation Act*, no disentailing deed is required to be executed on taking it out. The question has not yet been raised under the *Leases and Sales of Settled Estates Act*, but there can be no real difference between the two Acts.

Mr. *W. E. M. Tomlinson*, and Mr. *Alan Stewart*, appeared for parties representing the remaining shares.

Sir R. Malins, V.C.:—

There is really no distinction between payments out of Court made under the two Acts. I think, therefore, that a disentailing deed is not required in this case.

Solicitors: Messrs. *Hedges & Brandreth.*

## GIBBS *v.* DAVID.

[1875 G. 85.]

V.-C. M.
1875
June 21, 24.

*Contract to purchase a Mine—Suit to rescind Contract—Appointment of Receiver and Manager.*

In a suit by the purchaser of a coal mine to rescind the contract on the ground of fraudulent misrepresentations, it being essential that the mine should be kept in a going state, the Court, upon the application of the purchaser, who was in possession of the colliery, appointed a receiver and manager until the hearing.

THIS suit was instituted for the purpose of obtaining a declaration that a contract dated the 1st of November, 1873, for the purchase of a colliery by the Plaintiffs, was obtained by fraud, and was void as against the Plaintiffs, and that the said contract and certain promissory notes which had been given in part payment of the purchase-money might be ordered to be delivered up to be cancelled. That an account might be taken of the sums received by the Defendants, and that they might be ordered to repay what should be found due. That the assignment, a memorandum of deposit which had been given to secure part of the purchase-money, and all other instruments and documents consequential on the contract for purchase, might be dealt with so as to restore the parties as nearly as possible to their original position. That an injunction might be granted to restrain the Defendants from parting with or negotiating any of the promissory notes given by the Plaintiffs, which were in their hands, and that a receiver and manager might be appointed to carry on the colliery for the benefit of such persons as might be decided to be the owners thereof, in such manner as the Court should direct.

The bill alleged that the Plaintiffs had entered into negotiations with the Defendant *T. S. Webb*, who proposed to them to join him (*Webb*) in the purchase of a coal mine called the *Hendredenny Colliery*, which had been leased to the Defendants *David* and *Sloper*, the Plaintiffs finding the purchase-money in the first instance. For this colliery the Plaintiffs were to pay £30,000; £5000 in cash and the rest in instalments extending over four

V.-C. M. 1875 GIBBS v. DAVID.

years, to be secured by the promissory notes or bills of the purchasers. The agreement for the purchase was executed, and several of the instalments were paid when the Plaintiffs discovered that *Webb* had been acting as the agent of *David* and *Sloper* for the sale of the mine, and that the Defendant *Thomas Davies* was associated with them; that they were all to receive certain portions of the profits arising from the transaction; that *Webb* had received from *David* and *Sloper* a large sum as commission for effecting the sale, and that the mine, which was represented to be of great value, was, in fact, worth much less than the price paid, and at the time of filing the bill had not begun to pay working expenses.

The bill also alleged that it was essential that the mine should to some extent be worked, in order to avoid flooding and other injury, and also to prevent forfeiture to the landlord, and that it would be for the benefit of all parties interested that a receiver and manager should be appointed in the suit, so that the property might be preserved until the hearing, without prejudice to the question whether the Plaintiffs were entitled to rescind the purchase, or whether the colliery was to belong to the Plaintiffs.

The Plaintiffs had entered into possession of the mine.

An interim injunction had been granted to restrain the negotiation of the bills in the hands of the Defendants.

Mr. *Glasse*, Q.C., Mr. *Higgins*, Q.C., and Mr. *Hemming*, for the Plaintiffs, now moved that a receiver and manager should be appointed to carry on the colliery until the hearing:—

The object of this bill is to set aside a contract for the purchase of a colliery. If the suit is successful, the Defendants will become the owners of the property, but if the bill fails, then the property will belong to the Plaintiffs. It is shewn that if the mine is not worked it will be seriously damaged by flooding, and it will be in the power of the landlord to forfeit the lease for non-fulfilment of the covenants. The Plaintiffs are in possession, and the mine has hitherto been kept up as a going concern, but the expenses of working it are greater than the profits arising therefrom, and the Plaintiffs feel that they may be called upon to prove every item of expenditure, and that they have conducted the works in the

most economical manner. This would lead to unnecessary litigation, and throw upon the Plaintiffs an obligation which it is unjust that they should bear. Under such circumstances, it is most desirable for all parties that a receiver and manager should be appointed with the sanction of the Court, in order that justice should be done to both parties. The right to a receiver rests upon the general principle of the Court that it will preserve any property the subject of dispute, pending litigation, and the application is supported by the authority of *Boehm* v. *Wood* (1), where a receiver was applied for on the motion of the vendor of an estate pending a reference as to title. In that case the property consisted of buildings and offices, and it was necessary to effect insurances and expend money in repairs, and a bill having been filed for specific performance of a contract for sale of the estate, each party wishing to divest himself of the ownership of the property, the Court appointed a receiver until the hearing of the cause, the question being reserved who should bear the expense.

Mr. *Cotton*, Q.C., and Mr. *Macnaghten*, for the Defendants *David* and *Sloper*:—

The case made by the bill is that the contract was brought about by the fraudulent representations of the Defendant *Webb*, but it is not shewn that our clients, Messrs. *David* and *Sloper*, were cognizant of these misstatements. If there should be a case for a receiver against *Webb*, there is none as against *David* and *Sloper*. This is a bill to set aside the purchase, the purchasers are in possession, and have carried on the mine ever since the date of the contract. It is, therefore, for them to continue the working of the mine upon their own responsibility, and they have no right to call upon the Defendants to bear any extra expense for the appointment of a receiver. It is not the practice of the Court in such cases as these to appoint a receiver.

The Defendant *Webb* was not represented.

SIR R. MALINS, V.C.:—

As far as I know of the case at present, although the precise

(1) 2 Jac. & W. 236.

V.-C. M. 1875 GIBBS v. DAVID.

circumstances certainly have not occurred before, I cannot help thinking that, upon principle, I shall not much err if I accede to the application of the Plaintiffs.

The question brought before the Court is a very remarkable one. The two Plaintiffs, Mr. *Gibbs* and Mr. *Joachim*, are, it is stated, merchants in the city of *London;* and their case is this, that, by representations made to them by the Defendant *Webb*, they have been induced to purchase a colliery in *South Wales*. They allege that the representations made by *Webb* were entirely false, and that if they had known the falsehood of such representations they would not have purchased the colliery. The persons from whom the colliery was bought are Mr. *Cotton's* clients, *Charles William David* and *John Sloper*, and, of course, if it turns out that whatever representations were made by *Webb* they were made without the knowledge of these two Defendants, they will not be answerable, and the suit will fail. But the bill alleges that, in point of fact, *Webb* was the bribed agent of these Defendants to make these false representations; and if this turns out to be the truth and is established at the hearing, the contract will be set aside, the suit will succeed, the Plaintiffs will be entitled to be relieved from all further payments, and will take out of Court all the moneys paid in and all that may be hereafter brought in. In other words, the contract will be undone. But the property is a colliery, and a going colliery, and both sides admit that it must be kept going or the lease will be forfeited; and, moreover, if it is not kept going it will be drowned out, and therefore it is absolutely necessary it should be worked.

In this state of things, I think it is clearly uncertain to whom the colliery belongs. If the Plaintiffs are right in their allegations on the bill, the colliery does not belong to them but to *David* and *Sloper*. If, on the other hand, the allegations are erroneous, then the colliery belongs to the Plaintiffs, and *David* and *Sloper* have nothing to do with it. It is according to the practice of the Court to keep property in security until the right is decided, and therefore, it being totally uncertain to which of these two parties this colliery belongs, it does seem to me in accordance with practice and principle that the property shall, as far as possible, be kept in security.

Then, it is asked, why should this be done? The Plaintiffs are in possession; they say they were fraudulently induced to take possession, and being in possession they are incompetent to deal with the property in its present position, and if they should succeed in this suit they will have a demand against the Defendants for all moneys properly expended in working the colliery. It is of very great importance that the colliery should be so worked as to leave as little doubt as possible whether it was properly or improperly worked. If the Court appoints an officer competent to manage a colliery, and he says, I have carried on the colliery and made a gain, then the gain will belong to the party to whom the mine belongs. If, on the other hand, he says, I have been obliged to carry on the colliery at a loss, that loss will have to be borne by the Plaintiffs if they fail in their suit, and by the Defendants if the Plaintiffs succeed.

Now I will assume in favour of the Defendants that all these charges are unfounded and that the suit will fail, and I will continue to act upon that assumption until the contrary is proved. If, therefore, the suit does fail and a receiver is appointed, and he is supplied with the means of carrying on the colliery by the Plaintiffs, what damage will be done to the Defendants? It is impossible they can be damaged to the extent of a farthing. If, on the other hand, the suit should succeed, then a very material benefit may arise to the Plaintiffs in the manner I have pointed out, on its being ascertained in this way what is the proper expenditure in carrying on the colliery. Therefore I shall do what this Court is constantly in the habit of doing where property is in dispute and as was done in *Loehm* v. *Wood* (1). There it was uncertain to which of two parties the estate belonged, because, although the Plaintiff was the vendor, he had sold it to *Wood*. *Wood* took objections to title, and, if those objections were well founded, the estate belonged to the vendor, and if they were unfounded it belonged to *Wood*. A receiver was appointed upon the principle that it was uncertain to which of the two parties, Plaintiff or Defendant, the estate belonged. It seems to me in this case that the Court should appoint a protector or manager of the estate, in order that when it is decided to whom it belongs

(1) 2 Jac. & W. 236.

V.-C. M. 1875 GIBBS v. DAVID.

justice may be done. Therefore upon principle, and I think upon authority, I shall accede to the application that a receiver be appointed. The Plaintiffs must supply the means of carrying on the colliery, and, as in *Boehm* v. *Wood* (1), the question at whose expense the receiver is to be appointed and the colliery is to be carried on will be reserved. If the suit succeeds it will be at the expense of the Defendants. The receiver's duty will be to keep the colliery going, and out of his receipts he will pay all the outgoings, and, so far as they are insufficient, the Plaintiffs must undertake to supply him with the money required. The Plaintiffs will nominate a receiver, and the Defendants will be heard in Chambers; but it will be my duty to see that a man is appointed who is skilled in the management of collieries and who will do the best he can for both parties. The Defendants must also undertake not to negotiate the bills in their possession.

Solicitors for the Plaintiffs: Messrs. *Miller & Wiggins.*
Solicitors for the Defendants: Messrs. *Cunliffe & Beaumont.*

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V.-C. M. 1875 *June* 25.

## CROSS *v.* MALTBY.

[1858 C. 31.]

*Will—Words—Benefit of Survivorship—"Survivors," when read "Others."*

A testator directed the income of the residue of his estate to be divided between all his sons as tenants in common, with benefit of survivorship between them, in case any or either of them should die without issue, and in case any child or children who should be entitled under the trusts of his will to any principal money, or income, should die leaving issue, the principal money, or share, from which the interest of such child or children should be derived, should go to and be divided amongst such issue as tenants in common.

The testator left five sons, two of whom died leaving issue, and three died without issue, the last survivor of the five dying without issue:—

*Held*, that on the death of the last surviving son the principal set free accrued to the children of the sons who had died leaving issue.

*JOHN CROSS*, by his will, dated the 10th of September, 1835, after providing for his daughters and various members of his

(1) 2 Jac. & W. 236.

family, directed his trustees to divide the dividends, interest, and income to arise from the clear residue of the proceeds of his estate, between and amongst all his sons, as tenants in common and not as joint tenants, with benefit of survivorship between or amongst them in case any or either of them should die without leaving lawful issue, and it was his will that in case any child or children who should be entitled under the trusts of that his will to any principal money, or income, should die leaving lawful issue, the principal money, or share from which the interest of such child or children should be derived, should go to and be divided amongst such issue, share and share alike, as tenants in common.

The testator died in January, 1836, leaving five sons and eight daughters; one of his sons, *Samuel Cross*, died in 1837 without having been married; *Francis* died in 1862 without leaving issue; *James* died in 1872 leaving issue; *John* died in 1873 leaving issue; and *Alexander*, the last survivor, died in January, 1875, without having been married.

A suit was instituted in February, 1858, for the administration of the testator's estate, and the shares of the several sons were carried over to separate accounts.

The present Petition was presented upon the death of *Alexander Cross*, the last survivor of the five sons of the testator, by the children of the two sons who died leaving issue, praying that the capital sum, representing the share of the late *Alexander Cross*, might be ordered to be divided into two equal parts, one part thereof to be divided between the children of *John Cross*, one of the sons, and the other moiety to be divided between the children of *James Cross*, the other son, who died leaving issue.

Mr. *Higgins*, Q.C., and Mr. *Shebbeare*, in support of the Petition:—

There can be no doubt as to what the intention of this testator was, and that intention may be carried out by construing the term "with benefit of survivorship amongst them in case any or either should die without issue," to mean the benefit of the others who should die leaving issue. The Court will always construe the word "survivor" as "other," to carry out the evident intention of

V.-C. M. 1875 CROSS v. MALTBY.

the testator. This was decided in *Badger* v. *Gregory* (1), in *In re Arnold's Trusts* (2), in *Waite* v. *Littlewood* (3), and more recently by your Honour in *In re Palmer's Settlement Trusts* (4). In all these cases the word "survivor" was read "other," and there can be no doubt that the intention of the testator in each of the cases was carried out by such construction.

Mr. *Waller*, Q.C, and Mr. *Harvey*, appeared for persons in the same interest.

Mr. *Romer*, for the representatives of *Alexander Cross*:—

These words, "with benefit of survivorship," do not occur in any of the cases cited, and they are not words that can be brought within the principle as to reading the word "survivor" as "other." There is a still more fixed principle, which is to give every word its literal meaning, and that may be done in this case. Here the testator gives the dividend, interest, and income of his estate between and amongst all his sons as tenants in common; the benefit of survivorship only applies to the life estate of the sons, and there could be no benefit of survivorship on the death of the last survivor. The use of the words "principal money, or income," shews that the testator contemplated one son taking the whole. An indefinite gift of dividends passes the absolute property of stock: *Page* v. *Leapingwell* (5). In the case of *Dowling* v. *Dowling* (6), where the expression was "the interest to be divided half-yearly between my four sons, and at the decease of either without lawful issue, such share to revert to the remainder," it was considered to be an absolute gift to the sons, subject to this condition, that upon the death of either of them without issue, the share was to revert to the remainder then living, or their children; and that the children were not to take any interest as against their parents.

It is, submitted, therefore, that in this case there is an absolute gift, subject to be curtailed only in case of death without issue in the lifetime of any of the other brothers; or otherwise there is a gift of life interests, with a gift over in case of no issue, to the

(1) Law Rep. 8 Eq. 78.
(2) Ibid. 10 Eq. 252.
(3) Ibid. 8 Ch. 70, 73.
(4) Law Rep. 19 Eq. 320.
(5) 18 Ves. 463.
(6) Law Rep. 1 Ch. 612.

other brothers who should be alive; but if no others should survive, then there would be an intestacy.

The principle is well defined by Mr. *Vaughan Hawkins*, in his book on Wills (1), in these words:—

"Where there is a gift to several, or to a class, as tenants in common in tail, with remainder as to the share of each to the 'survivors' or 'surviving' devisees in tail, with a limitation over on failure of issue of all the devisees, the words 'survivor' or 'surviving' will be construed as 'other,' so as to create cross-remainders among the devisees by express limitation either in a deed or will. Although in other cases 'surviving' may be read as 'other' if the case require it, the later authorities are adverse to this construction. Thus, if personal estate be given to several, or to a class, as tenants in common, either for life or absolutely, with a gift over of the shares of those dying without issue to the survivors, but without a gift over on failure of issue of all, the word 'survivor' will be construed strictly."

This case is an exact illustration of the principle there defined—that the word "survivor" will not be read "other" unless there is a gift over on failure of all the tenants for life without issue. In *In re Palmer's Settlement Trusts* (2) there was a gift over, but here there is none.

SIR R. MALINS, V.C.:—

This will is not very astutely expressed, but there is sufficient to shew the intention of the testator.

There is no rule more clearly established than this, that when the intention of a testator is clearly manifest the Court will endeavour to carry out that intention as far as the words will permit:—[His Honour then stated the terms of the will.] The testator had five sons. Two of them died leaving issue, and the other three died without issue, including *Alexander*, the last survivor of the five sons.

It cannot be denied that when the testator says "with benefit of survivorship if any die without leaving issue," that he intended the share of each child to go over. I think the intention is

(1) Page 202. (2) Law Rep. 19 Eq. 320.

V.-C. M. 1875 CROSS v. MALTBY.

expressed that whatever interest the children take, the sons are to be tenants for life. How is it to go over, and what benefit of survivorship is there to be? It cannot depend on the circumstance whether the son who might die without issue should survive the other sons. I cannot express the principle better than I have done in *In re Arnold's Trusts* (1) and in *In re Palmer's Settlement Trusts* (2), that the word "survivor" must be read as "other" whenever the meaning renders it necessary.

In *In re Palmer's Settlement Trusts* I referred to several cases, all of them authorities in favour of reading the word "survivor" as "other" when it was requisite to do so, in order to give effect to the intention. There is no magic in the word "survivor." The benefit of survivorship meant that it was to go over if any one died without issue.

The intention is that each child shall only be tenant for life in what he takes, and then the issue take *per stirpes* of that family. If one left a family, that class would have the benefit of survivorship to the one who so died leaving children; but if any died without children, then the children of the others would have the benefit of survivorship as to the shares which would have come to their respective parents. Mr. *Romer* relied on *Dowling* v. *Dowling* (3). There the property was directed to be invested and the interest to be divided half-yearly between the four sons of the testator, and at the decease of either without issue such share to revert to the remainder then living, or their child, or children. When the case came before Vice-Chancellor *Stuart* he decided that the four sons took only an estate for life with an estate by implication to the issue living at their death as joint tenants; but upon appeal the Lords Justices reversed that decision, and held that each of the four sons took an absolute interest in his share subject to be divested in case of his dying without leaving issue. The children were not to take any interest as against their parents, but if the parents were out of the way then the intention was that the children were to take in their place. Therefore that case does not support Mr. *Romer's* argument, because it shews that if one died without leaving issue his interest would be divested

(1) Law Rep. 10 Eq. 352. (2) Law Rep. 19 Eq. 320.
(3) Law Rep. 1 Ch. 612.

and would go to the remainder; but if all the others were dead it would go to the children in their place. So here the share of *Alexander Cross* upon his death without children went over to the children of the other sons who had died leaving issue, and the children of each of the two sons who died leaving issue will take the share to which their father would have been entitled.

V.-C. M. 1875 CROSS v. MALTBY.

Solicitors for the Petitioners: Messrs. *Hensman & Nicholson.*
Solicitors for the Respondents: Messrs. *Jackson, Fox, & Eller.*

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## MACDOUGALL *v.* GARDINER.

V.-C. M. 1875 *June* 28.

[1874 M. 200.]

*Practice—Company—Frame of Suit—Bill against Directors—Right of individual Shareholder to sue—Fraud—Ultrà vires—Constitution of Company—Authority of Chairman of Meeting.*

An individual shareholder in a company is entitled to file a bill against the directors on behalf of himself and all other shareholders except the Defendants, if he alleges that the directors, or some of them, have so acted as to prevent a majority of the members from exercising a proper control over the affairs of the company.

The articles of association of a company gave power to the chairman at any general meeting of the company, with the consent of the meeting, to adjourn the meeting, and also provided for the taking a poll if demanded by five shareholders. At a general meeting of the company the adjournment of the meeting was moved, and on being put was declared by the chairman, who was one of the directors, to be carried. A poll was duly demanded, but the chairman ruled that there could not be a poll on the question of adjournment, and left the chair. The shareholders who sided with the Plaintiff then passed a resolution, among others, removing one of the directors:—

*Held*, on bill filed by a shareholder averring these facts, and charging that the directors, or some of them, had combined to take this course with the view of stifling discussion, that this made a case of improper conduct, bordering upon fraud, which entitled the Plaintiff to maintain his suit for restraining proceedings by the directors, which the Plaintiff and his party desired to prevent.

Affd on appeal L.R. 10 Ch. Div. 13. C.A.

DEMURRER.

This was a bill filed by *Alexander William MacDougall* on behalf of himself and all other shareholders in the *Emma Silver Mining*

V.-C. M. 1875 MacDougall v. Gardiner.

*Company*, except the Defendants, against the directors and the company.

The bill, after stating that the company was incorporated in November, 1871, for the purpose of working a mine in the *United States of America*, called the *Emma Silver Mine*, set out several of the articles of association, amongst which were those numbered 40 and 42, which provided for summoning special general meetings, and 45, which enabled any member to propose and introduce at a general meeting any subject relating to the affairs of the company of which he had given a certain notice, and 49, 50, and 51, which were as follows:—

"49. The chairman may, with the consent of the meeting, adjourn any meeting from time to time, and from place to place; but no business shall be transacted at any adjourned meeting other than the business left unfinished at the meeting from which the adjournment took place.

"50. At any general meeting, unless a poll be demanded by at least five members, a declaration by the chairman that a resolution has been carried, and an entry to that effect in the book of the proceedings of the company, shall be sufficient evidence of the fact without proof of the number or proportion of the votes recorded in favour of or against such resolution.

"51. If a poll be demanded by five or more members, it shall be taken in such manner as the chairman shall direct, and the result of such poll shall be deemed to be the resolution of the company in general meeting. In the case of an equality of votes at any general meeting the chairman of the meeting shall be entitled to a second or casting vote."

The bill also, after stating that the Plaintiff became a shareholder in the company in 1874, and was, when the bill was filed, the registered holder of 1750 shares in the company, alleged that prior to the month of May, 1874, circumstances had come to the knowledge of the Plaintiff and a large number of other members of the company leading to the conviction on their parts, as the facts were, that various fraudulent transactions had been carried on in connection with the purchase of the *Emma Mine* by the promoters of the company, which transactions had, in fact, been gross frauds upon the members of the company. The Plaintiff

and the other members of the company also believed that some of the then and present directors of the said company were to some extent interested in these matters adversely to the company. The Plaintiff and such other members of the company were consequently very desirous that some person who would make endeavours to have the matters connected with the purchase and with the promotion and formation of the company investigated, should be elected at the election of new directors of the company, which would take place in or about the month of May, 1874. Accordingly, efforts were made by a large number of members of the company to obtain the election of the Plaintiff as a director, he being willing and desirous to make such endeavours on being appointed a director, without any remuneration, until such remuneration could be paid out of profits earned by the company, and made this an express stipulation at the meeting. With this object a large number of the members of the company, holding, as the Plaintiff alleged, a clear majority of votes, in or about the month of May, 1874, agreed to vote in person, or to give their proxies at the said election to or in favour of the Plaintiff.

The existing directors desired to have a Mr. *Hutton* appointed a director, and on the 15th of May, 1874, the general meeting of the members of the company was held, and on the question of the election of a new director the chairman declared, on a shew of hands, that Mr. *Hutton* had been elected. A poll was then duly demanded on behalf of the Plaintiff, and the result was in favour of Mr. *Hutton*. The Plaintiff had then filed a bill for the purpose of raising some questions as to the alteration of the register of shareholders between the holding of the meeting and the taking of the poll, and moved for an injunction. Demurrers were, however, filed by the Defendants to that suit, which prevented the motion being heard before the Long Vacation of 1874.

The Plaintiff and other shareholders thereupon signed and sent to the office of the company a requisition, which was set out in the bill, calling upon the directors to convene an extraordinary general meeting for the purpose of requesting the chairman, who was the demurring Defendant, Colonel *Gardiner*, to resign his directorship and to appoint another director in his place.

V.-C. M. 1875 MacDougall v. Gardiner.

This requisition was signed by members of the company holding more than one-fifth of the capital of the company, and was left at the office of the company on the 8th of September, 1874, and other copies were afterwards signed by other shareholders and left at the office of the company.

On the 24th of September, 1874, the Plaintiff was informed that the directors did not intend to convene a special meeting, and he issued a fresh circular.

On the 6th of October, 1874, the directors issued a notice convening a special general meeting for the 14th of October.

The Defendants were, in fact, doing all they could to prevent the meeting being held, and had it not been for the Plaintiff's second circular they would not have convened such meeting, and the Plaintiff alleged that in giving so short a period between the notice and the day of meeting the directors gave as little time as possible to the shareholders to decide as to the course they would take, fearing they would side with the Plaintiff.

It then appeared that the Defendant *Gardiner* had gone to *America* with reference to some litigation then pending there with reference to the property in the mine, and had taken many of the most important books and papers of the company with him. Those books and papers were, in fact, necessary for the full investigation of the matters in this country which the Plaintiff and the other members of the company required.

The Plaintiff received proxies authorizing him to vote at the special meeting, from shareholders holding 15,000 shares, while the directors did not receive proxies to an extent reaching one-half of the number of shares represented by the Plaintiff. Previously to the meeting, the directors sent stamped proxies round to each of the shareholders, empowering Mr. *Hutton* to vote for them at the meeting and at any adjournment.

The Plaintiff prepared several resolutions for the purpose of proposing them at the meeting, which were set out in the bill; the two first of which were as follows:—

"1. That in the opinion of this meeting it is not consistent with the best interests of the company that Mr. *Robert May Gardiner* should remain a director of the company, and that he accordingly be requested to resign his office.

"2. That the said Mr. *Robert May Gardiner* not being present to meet the shareholders of this company, after the requisition calling this meeting (first lodged on the 8th of September last), and signed by shareholders, he is now removed from the office of director, and that Mr. be appointed a director in his stead."

The meeting took place on the 14th of October, 1874, Mr. *Hutton* being in the chair. He addressed the members, and urged an adjournment of the meeting, partly on the ground that a petition to wind up the company had been presented by a shareholder, and that it was expedient to postpone the discussion of the matters before the meeting until after the petition had been disposed of. The Plaintiff proposed the first resolution, and it was discussed by the chairman. Various trivial objections were taken to it, such as that it ought to have embraced the appointment of a new director as well as a request to *Gardiner* to resign. On that ground Mr. *Hutton* refused to put the first resolution to the meeting, although Mr. *Burnand,* the only other director present, openly dissented from that view. In the midst of the discussion which followed, and after the Plaintiff had pointed out that if the resolution were passed he would follow it up by others, copies of which the chairman held in his hand, a member proposed the adjournment of the meeting for a month. This proposal was seconded, and the chairman then put the resolution to the meeting, and declared it to be carried.

The 25th, 26th, and 27th paragraphs of the bill contained in substance the following allegations:

25. The friends of the directors voted in favour of the resolution, while the Plaintiff and the shareholders acting with him voted against it; and the chairman declared, on the shew of hands, that the resolution had been carried. Five members of the company then present, including the Plaintiff, demanded a poll; but the chairman refused to grant one, on the alleged ground that a poll could not be taken on the question whether the meeting should be adjourned or not, at once left the chair, declaring the meeting adjourned, and immediately left the room; but the demand for the poll was duly signed and handed in.

26. There was no ground under the articles of the company, or

V.-C. M. 1875 MacDougall v. Gardiner.

otherwise, for holding that a poll could not be taken upon whether the meeting of the company should be adjourned or not, especially when by the motion for adjournment the question before the meeting was, whether certain important matters should then be discussed and voted, or whether they should be postponed for a long or indefinite time. Mr. *Hutton*, however, had, in order to stifle the discussion, and to prevent the matters being voted upon to consider which the meeting was called, in collusion with the other directors, or some of them, determined to carry a vote of adjournment by shew of hands and then to refuse a poll on that question, so as to prevent the proxies given to the Plaintiff and his supporters from being used in support of the resolutions which he was about to bring forward, and which would undoubtedly have been passed but for the conduct of the Defendants.

27. After the poll had been refused several of the members of the company, including the directors, left the room, but a large number still remained, who voted the Plaintiff into the chair, when the Plaintiff's resolutions were passed, the name of *Charles Henry Dunhill*, M.D., of *York*, a duly qualified shareholder in the company, having been first added to the second resolution, he having been proposed and seconded and duly elected as a director of the said company in place of Colonel *Gardiner*.

The 28th paragraph of the bill set out a letter by the Plaintiff giving notice to the directors of the passing of the resolutions after Mr. *Hutton* had left the chair, and the allegations concluded as follows:—

"29. In this state of things the Plaintiff and the other shareholders in the company believe, and it is the fact, that the Defendant, the directors of the said company, are about to conclude some arrangements with the persons against whom the Plaintiff has claims, such as the original vendors of the said mining property to the Defendant company, or the promoters of the said company, and others, for the purpose of settling those claims, to the great injury of the company and the shareholders therein, and without first submitting those terms to the shareholders of the said company; and the Plaintiff apprehends, and the fact is, that the proposed compromises will at once be carried through unless the Defendants are restrained from so doing by the order of

this Honourable Court. The danger is in fact so imminent, that it is impossible for the Plaintiff and those acting with him to call another meeting for the purpose of removing all the directors of the company from their office, or for any other purpose which might effectually stop the said compromises, in time to prevent their being carried out; and even if such another meeting could be convened in time, the Defendants, by the same proceeding as they adopted at the meeting of the 14th day of October, would be again able to break up and would succeed in breaking up the said meeting by improperly deciding that it was adjourned by a mere shew of hands held up by a few friends or nominees of the said directors who are interested in putting an end to all further investigation into the aforesaid matters.

The bill prayed for a declaration that the refusal to grant a poll on the question whether the meeting should be adjourned at the meeting of the 14th of October was illegal and improper, and for an injunction to restrain the directors from concluding any arrangements with respect to legal proceedings commenced or to be commenced against the vendors of the property to the company, or with any other persons, until such arrangement, if proposed, should have been submitted to the shareholders in the company, and should have been approved of by them; and for a declaration that *Gardiner* had ceased to be a director, and might be restrained from acting as such director, or that a meeting of the shareholders should be summoned for the purpose of submitting the Plaintiff's resolutions to them.

At the time the bill was filed a petition to wind up the company was pending, and until it was heard, which was not till April, all proceedings in the suit were stayed. The petition having been dismissed, Colonel *Gardiner* demurred.

Mr. *Higgins*, Q.C., and Mr. *Wintle*, in support of the demurrer:—

There are two grounds of demurrer. First, the bill ought to have been in the name of the company. This is the rule laid down on the appeal in *Gray* v. *Lewis* (1), following *Mozley* v. *Alston* (2) and *Foss* v. *Harbottle* (3). A bill in the name of the

(1) Law Rep. 8 Ch. 1035. (2) 1 Ph. 790.
(3) 2 Hare, 461.

V.-C. M. 1875 MacDougall v. Gardiner.

company does not require to have the seal of the company affixed to it, or to be filed with the leave of the directors, but it is required to be in the name of the company in order to confer on the majority of the members of the company power to enforce their views upon the directors, and to give them the control over any litigation which may be commenced by persons acting in the name of the company, so that if they disapprove of any litigation thus commenced they may bring it to an end by passing a resolution to that effect: *Exeter and Crediton Railway Company* v. *Buller* (1). The only exceptions to this rule are where there is a case made of some fraud committed by the directors in the name of the company, or where something absolutely *ultrà vires* has been attempted to be done, as in *Clinch* v. *Financial Corporation* (2), *Macdougall* v. *Jersey Imperial Hotel Company* (3), and *Menier* v. *Hooper's Telegraph Works* (4). The other ground on which the interference of the Court is allowed is where a course has been adopted by the company injurious to some only of the members, as in *Const* v. *Harris* (5), *In re London and Mercantile Discount Company* (6), and *Atwool* v. *Merryweather* (7). None of these exceptions apply to the case made by the present bill, which simply relates to matters concerning the internal management of the company, as to which the Court will not interfere.

The second ground of demurrer is that the allegations of the bill do not support the prayer. The facts alleged must be sufficient of themselves to found the relief prayed: *In re Stranton Iron and Steel Company* (8). The allegations of this bill are vague and general, as in *Hayman* v. *Governors of Rugby School* (9). As regards the question of the poll the ruling of the chairman was quite right. A poll means a reference of the question in dispute to the whole constituency, not merely to those present at the meeting, and the poll must be kept open for a reasonable time: *Hodges* on Railways (10); *Reg.* v. *Cooper* (11). It is therefore a process quite inapplicable to a question of adjournment.

(1) 5 Railw. Cas. 211.
(2) Law Rep. 5 Eq. 450.
(3) 2 H. & M. 528.
(4) Law Rep. 9 Ch. 650.
(5) T. & R. 496.
(6) Law Rep. 1 Eq. 277.
(7) Ibid. 5 Eq. 464, n.
(8) Ibid. 16 Eq. 559.
(9) Ibid. 18 Eq. 28.
(10) 5th Ed. p. 49, note (*y*).
(11) Law Rep. 5 Q. B. 457.

The broad ground of the demurrer is that the allegations of the bill only shew the existence of disputes as to the internal management of the company.

Mr. *Glasse*, Q.C., and Mr. *Robinson*, Q.C., for the bill:—

The answer to the first ground of demurrer is that this bill comes within the exceptions to the rule, which requires bills filed on behalf of a company to be in the name of the company. The excepted cases are stated by Mr. Justice *Lindley* in his work on the Law of Partnership (1). *Foss* v. *Harbottle* (2) states the general rule. *Atwool* v. *Merryweather* (3) which is precisely in point, illustrates one of the exceptions. It was a case where, as here, a majority of the *bonâ fide* members of the company supported the litigation, but they were in danger of being overborne by a minority in collusion with two directors who acted fraudulently. *Menier* v. *Hooper's Telegraph Works* (4) illustrates the other exception to the relief asked for being such as only a minority were interested in. On the allegations of this bill this case is brought distinctly within *Atwool* v. *Merryweather*. It is expressly alleged that the proceedings of the directors were taken with a view to stifle discussion. That is an allegation of fraudulent conduct, which is necessarily *ultrà vires*.

On the second ground of demurrer the refusal to grant a poll is sufficient of itself to support the bill. The demand for the poll was duly made in accordance with the articles of association, and the refusal was a distinct violation of the constitution of the company, and a poll is the positive right of the shareholders if duly demanded: *Campbell* v. *Maund* (5); and the only remedy for refusing to take it is by bill: *Elt* v. *Burial Board of St. Mary Islington* (6). This is moreover a demurrer by one Defendant only, and if it is allowed the suit will not be brought to an end.

Mr. *Higgins*, in reply.

Sir R. Malins, V.C.:—

This bill relates to the affairs of a company which have occupied

(1) 3rd Ed. p. 935.
(2) 2 Hare, 461.
(3) Law Rep. 5 Eq. 464, n.
(4) Law Rep. 9 Ch. 350.
(5) 5 A. & E. 865.
(6) Kay, 449.

V. C. M. 1875 MacDougall v. Gardiner.

a great deal of the time of this Court, and I am bound to say, a great deal more than they deserve. I think it most unfortunate that in the present state of things, with the knowledge that has been acquired, the Defendant should have elected to demur to this bill. It has led to a most unfortunate occupation of the time of the Court, and I am now called upon to decide the rights of the parties upon allegations which, I have no doubt, if I were at liberty to go into the evidence upon the subject, would turn out to be almost wholly erroneous. I must regard and consider Colonel *Gardiner* as acting on behalf of himself and the others in the same position, and he has elected to take the opinion of the Court upon allegations in the bill, which certainly do not fall short of charging him and those associated with him with gross acts of impropriety, if not acts of fraud. But as the parties have insisted in having the demurrer heard, I can only decide the question upon the facts stated in the bill, which are admitted by the demurrer to be accurately stated, and I agree with Mr. *Glasse* that I must, for the purpose of deciding this demurrer, exclude all the knowledge which I have acquired since the month of October last of the affairs of this company. The question I have to decide is whether the allegations of this bill entitled the Plaintiff, on the day it was filed, namely, the 19th of October last, to sustain it against Colonel *Gardiner*, who has demurred, and against the other Defendants who cannot demur, but who, no doubt, if they could, would take the same course of defence.

Now, with regard to the question whether the Plaintiff can or cannot maintain this suit, there have been so many authorities cited, and so many principles adverted to, and I have myself had occasion to consider the subject so often—some of the decisions cited being mine—that I may consider the law to stand thus: In all matters of internal regulation of a company where the company has acted within its own powers, an individual shareholder cannot sustain a bill in this Court relating exclusively to such internal affairs of the company. If, therefore, the directors are acting in one mode, and a shareholder thinks it would be much more wise to act in another mode in a matter of internal arrangement, he must be bound by the will of the majority; and his proper course is, not to come to this Court for relief, but to call a meet-

ing of the shareholders, in pursuance of the constitution of the company, to take the decision of the majority, which must be binding upon him. That is the rule when the directors are acting within the line of their authority. That was decided in the cases of *Foss* v. *Harbottle* (1), *Mozley* v. *Alston* (2), and in a case of *Lord* v. *Company of Copper Miners* (3), which all go upon the same principle, which is, that as to the internal arrangements of the company a bill cannot be sustained. I take it to be equally clear that if a company exceeds the limits of its authority in the exercise of its powers, that is, goes beyond its constitution, as, for instance, if a coal mining company were to embark in smelting iron, then any individual shareholder can sustain a bill to prevent their going beyond their powers. I stated this, I believe correctly, in a passage in my judgment in *Gray* v. *Lewis* (4): "It was strongly urged that this is not a case in which a shareholder can maintain the suit on behalf of himself and the other shareholders, because the right of maintaining such a suit is limited to cases in which the acts complained of are *ultrà vires* of the company, that the acts here complained of are capable of being released or confirmed by the company, and that the company itself are, therefore, the only proper Plaintiffs, on the principle of *Foss* v. *Harbottle* and *Mozley* v. *Alston*. But here the very ground of the complaint is that the guarantee given by the company was beyond its powers, and the case, therefore, is one in which the bill is properly filed by a shareholder to assert the rights of himself and his co-shareholders against the illegal acts of the company, and it falls, in my opinion, within the principle of the present Lord Chancellor's decision, when Vice-Chancellor, in *Atwool* v. *Merryweather* (5). This objection to the frame of the suit, therefore, in my opinion, fails." If, therefore, the acts complained of are acts beyond the powers of the company, an individual shareholder can maintain a suit to keep them within the limits of their authority.

But there are other acts which, I think, a shareholder can sustain a bill to restrain besides acts beyond the authority of the company. When the company itself is guilty of improper or

(1) 2 Hare, 461.
(2) 1 Ph. 790.
(3) 2 Ph. 740.
(4) Law Rep. 8 Eq. 541.
(5) Law Rep. 5 Eq. 464, n.

V.-C. M. 1875 MacDougall v. Gardiner.

fraudulent conduct, as when the directors act in an overbearing manner, which is as much beyond their power as if they were going into foreign objects, because it is their duty to act fairly and honourably in the conduct of the business, or if they act in a fraudulent manner, I take it that an individual shareholder can maintain a bill to restrain them from such acts. I believe the law is correctly stated in the passage of Mr. Justice *Lindley's* treatise on the Law of Partnership, which was cited by Mr. *Glasse* (1), in which it is said, "A Court of Equity will not interfere between partners merely because they do not agree. It is no part of the duty of the Court to settle all partnership squabbles; it expects from every partner a certain amount of forbearance and good feeling towards his co-partner; and it does not regard mere passing improprieties arising from infirmities of temper as sufficient to warrant a decree for dissolution or an order for an injunction or a receiver." In support of this view many authorities are cited, and he continues: "And when partners have themselves agreed that the management of their affairs should be intrusted to one or more of them exclusively, the Court will not remove the managers, or interfere with them, unless they are clearly acting illegally and in breach of the trust reposed in them." Then comes this passage: "This principle has been extended to companies, and, as a general rule, it may be stated that a Court of Equity will not interfere between members of companies for the purpose of enforcing duties arising out of matters which are properly the subject of internal regulation. It will not interfere to control a majority unless it sees that the majority has been or is doing or is about to do that which it is illegal even for a majority to do."

Therefore, upon that principle, wherever the Court sees that the acts to be restrained are not merely *ultrà vires*, but of a fraudulent character, or acts which even the majority ought not to be permitted to do, this Court will entertain a bill to restrain such acts, and it is in vain to demur to such a bill upon those grounds.

Therefore I desire to be understood as expressing the opinion, first, that when the acts complained of are *ultrà vires*, and,

(1) 3rd Ed. p. 935.

secondly, when they are not *ultrà vires*, but are of a fraudulent or improper character, then the remedy of the shareholders is to file a bill in this Court to restrain those improper acts because of their being fraudulent or having an improper tendency, and the objects of the company being to act fairly and properly in all transactions, they are just as much *ultrà vires* as if they were for a purpose foreign to the constitution of the company.

If I am right in that conclusion, it follows that the question here is whether the allegations of this bill shew conduct on the part of the directors, or on the part of the company, which it is impossible for the directors of the company to pursue.

[His Honour then read those clauses of the articles of association stated above, and read and commented on the paragraphs of the bill relating to the meeting of the 14th of October, and continued :—]

If the chairman has the absolute power of declaring that the meeting concurs in a resolution, and his declaration is conclusive, this meeting was properly adjourned, and the great bulk of the Plaintiff's complaint falls to the ground. But I am of opinion that he has not such an absolute power, and it would be very unreasonable if he had, because there might be a chairman capable of acting in an unfair and fraudulent manner; and although the voice of the meeting were one way, he might declare it to be another, and therefore all assemblies require to be protected against that kind of conduct, and this company is protected by the 50th of the articles of association. The demand for the poll was duly signed and handed to the chairman of the company, and I have no hesitation in coming to the conclusion that he was bound to accede to the demand. It is not necessary for me to consider whether a poll should be then and there or at some future time taken, because it was not on that ground that the chairman refused the poll, but he absolutely declined to take any poll whatever, and made his own voice conclusive, which by the constitution of the company it was not. That was so improper a proceeding, that, in my opinion, it would of itself entitle the Plaintiff to come to this Court to ask for relief.

Then it does not depend on that only. I must take every allegation and statement properly pleaded and alleged to be true.

V.-C. M. 1875 MACDOUGALL v. GARDINER.

[His Honour then read and commented on the remaining paragraphs of the bill, and continued:—]

Upon the face of this bill the directors are charged with intending to defraud the shareholders, and to carry those fraudulent intentions into effect by means of holding a colourable meeting, packed and composed of individual shareholders of small amount, and by not allowing the shareholders who are represented by their proxies to have any voice in the matter, and thus carrying their fraudulent intentions into effect; and to such a bill as that the Defendant has thought fit to demur. It is very true that he individually was not present at the meeting; so far, therefore, he is not accused of being a party to the transactions. But if, where there are these charges of fraudulent conduct, and fraudulent conduct being beyond the powers of a company, this Court cannot be resorted to by an individual shareholder who cannot command a majority to enable him to use the name of the company, there would be power in the directors of a company to carry into effect any fraudulent scheme they might think fit to adopt.

Now many cases have been cited. I have adverted to some of them, and I think the case which Mr. *Glasse* relied on particularly, the case of *Menier* v. *Hooper's Telegraph Works* (1), where an individual shareholder sustained a bill charging fraudulent conduct by the majority of shareholders, on the principle that it was beyond his power otherwise to prevent such conduct taking place.

The case of *Atwool* v. *Merryweather* (2) was a remarkable one also, and I had occasion to refer to it in the case of *Gray* v. *Lewis* (3); for there, although the Vice-Chancellor *Wood* was compelled to allow a majority of the members of a company to take a bill filed in the name of the company off the file, yet, on the proof of the existence of fraudulent conduct on the part of some of the members, he allowed the bill to be sustained by individual shareholders.

On these grounds, therefore, being of opinion that the allegations of this bill do shew improper conduct on the part of the governing body, that there has been a mischief committed which ought not to continue, and that it is shewn on the allegations in the bill,

(1) Law Rep. 9 Ch. 350. (2) Law Rep. 5 Eq. 464, n.
(3) Law Rep. 8 Eq. 541.

which are admitted to be true upon demurrer, that there is conduct which is illegal, or which a majority ought not to adopt, the suit can, in my opinion, be sustained in the name of an individual shareholder. The demurrer, therefore, must be overruled, with the usual result as to costs.

V.-C. M. 1875 MACDOUGALL v. GARDINER.

Solicitors: Messrs. *Valpy & Chaplin;* Messrs. *Bischoff, Bompas, & Bischoff.*

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## GRAHAM *v.* McCULLOCH.

V.-C. M. 1875 *June* 29.

[1867 G. 171.]

*Partnership—Decree for Dissolution—Purchase of Business by one Partner—Possession under the Order of the Court—Order and Disposition—Consent of the true Owner.*

By the decree in a suit a partnership between the Plaintiff and Defendant was dissolved, and the business and partnership property were ordered to be sold as a going concern, either party being at liberty to bid. Under a subsequent order the Plaintiff became the purchaser, he having in the meantime been carrying on the business for the benefit of the purchaser. Under the order approving of the purchase by him he was allowed to go into possession at once as purchaser. He continued in possession for some time, and ultimately became bankrupt:—

*Held*, that under the circumstances the business and partnership property were in the order and disposition of the bankrupt with the consent of the true owner.

THIS was a summons to vary the Chief Clerk's certificate.

The bill, which was filed on the 27th of November, 1867, was for the dissolution of a partnership formerly existing between the Plaintiff *Graham* and Defendant *McCulloch* in the business of a druggist, seedsman, and herbalist, carried on at *Covent Garden,* and a decree was made on the 12th of December, 1867, dissolving the partnership as from the 27th of November, 1867, and ordering, amongst other things, that the business, stock-in-trade, and other property and effects belonging to the partnership, and the goodwill thereof, should be sold as a going concern, and giving the Plaintiff and Defendant liberty to bid at the sale. *Graham* was in possession.

V.-C. M. 1875 GRAHAM v. MCCULLOCH.

By an order of the Court, dated the 23rd of July, 1868, made in Chambers, an offer of *McCulloch* to purchase the business, stock-in-trade, and other property and effects belonging to the partnership for £4300 was accepted, and it was ordered that the Defendant should, on or before the 8th of August, 1868, pay into Court to the credit of the cause £430 as a deposit, and should pay the residue of the purchase-money into Court on or before the 21st of August, and that upon these payments being made the Defendant should be let into possession of the stock-in-trade, property, and effects of the business, and all securities in the possession of the receiver for any outstanding personal estate, and he was ordered also to pay into Court interest on the £4300 at 5 per cent. till payment of the capital to be invested and accumulated.

*McCulloch* made default in payment of the purchase-money, and *Graham* continued in possession of the stock-in-trade and effects of the partnership. By an order of the 21st of November, 1868, it was ordered that, notwithstanding the previous order, the business, stock-in-trade, and effects of the partnership, and the good-will, should be re-sold as a going concern, and that either party should have liberty to bid at the sale, and the purchase-money was to be paid into Court to the credit of the cause.

By an order of the 16th of March, 1869, an offer by the Plaintiff *Graham* to buy the business for £3000 was accepted, and he was ordered to pay interest on the purchase-money at 5 per cent. till payment of the principal, and was to be entitled to the gains and profits, and to the possession of the stock-in-trade and the partnership property as from the date of the order.

*McCulloch* became bankrupt on the 5th of November, 1869, and the suit was revived against his assignee.

*Graham* continued in possession, but paid no part of the purchase-money of the business, or any interest thereon. He continued in possession till the 29th of November, 1872, when he filed a petition for liquidation, upon which petition *J. J. Saffery* was appointed his trustee in bankruptcy, and by an order of the 3rd of April, 1873, it was ordered that *Saffery* should be at liberty to sell the business to *Sidney George Hart*, who was the receiver in the cause, *A. H. Macdonald*, and *McCulloch*, for £3500, to be paid in instalments.

Under subsequent orders, sums of £1048 15*s.* 2*d.*, and £682 6*s.*, and £200 4*s.* 3*d.*, representing portions of the purchase-money, were paid into Court to the credit of the cause.

These facts appeared from the Chief Clerk's certificate, which was dated the 19th of January, 1875, and he also found that the above-mentioned sums of money formed part of the partnership assets.

The point raised by the summons was that the business and partnership effects were in the order and disposition of *Graham* at the date of his bankruptcy with the consent of the true owner, and consequently that the purchase-money of £3500 belonged to his estate, the partnership being entitled to prove in the bankruptcy for the £3000 purchase-money agreed to be paid by him, with interest at 5 per cent.

Mr. *J. Pearson*, Q.C., and Mr. *Horton Smith*, for the trustee in bankruptcy:—

At the time of the Plaintiff's bankruptcy the Court was the true owner of the business and partnership assets, and he was put into possession of them under the order of the Court. They were therefore in the order and disposition of the bankrupt with the consent of the true owner. On the bankruptcy taking place the title passed to the bankruptcy trustee, and the purchase-money now in Court belongs to the estate, and must be divided amongst the creditors: *Ex parte Assignees of Brewster and West* (1).

Mr. *Glasse*, Q.C., and Mr. *F. A. Lewin*, for the present Plaintiff in the suit:—

This is not a case of actual assignment. By the decree there was a direction to sell the partnership as a going concern, and till sale *Graham* remained in possession for the benefit of the partnership. All that the order of the 16th of March, 1869, did was to continue him in possession. The Court never parted with the control, and might have resumed possession at any moment. The only difference was that, instead of accounting for the profits, he would have to pay 5 per cent. on the capital. There was nothing like entry by him into possession with the consent of the true

(1) 22 L. J. (Bkcy.) 62.

V.-C. M. 1875 GRAHAM v. MACCULLOCH

owner, as would be necessary to put the property in the order and disposition of the bankrupt. If there had been an assignment, the case would have been brought within *Ex parte Assignees of Brewster and West* (1); as it is, the case is exactly like *Reynolds* v. *Bowley* (2), in which one partner had allowed the other *bonâ fide* to carry on the business ostensibly as his own, and it was held that, on the active partner becoming bankrupt, the business was not in the order and disposition of the bankrupt with the consent of the true owner. *Ex parte Cooper* (3) shews that where there is no actual assignment of the partnership property there is no reputed ownership. It was necessary, in order to effect a sale of the business as a going concern, that some one should be in possession, and there was simply left there the person who was known as having been the active manager for the partnership. There was no holding out to the public that there had been any change of ownership.

Mr. *Pearson*, in reply.

SIR R. MALINS, V.C., after referring to the facts, continued:—

I think there cannot be a doubt that the effect of the order of the 19th of March, 1869, was to put *Graham* in possession as sole owner as absolutely as could be done by any assignment, and that I am bound to treat him as such from that time.

Now, it is said on one side that the business belonged to the partnership at the date of the bankruptcy, and was not in the order and disposition of the bankrupt with the consent of the true owner, because the true owner was the Court, and the Court never intended to part with the control. In my opinion, this contention is entirely unsustainable, and every principle of the rule as to order and disposition applies to the present case, and it would be monstrous to say that the Court of Chancery had not parted with the control over the partnership property. I was surprised when I heard such a proposition.

I think that all the cases cited in opposition to *Ex parte Assignees of Brewster & West* proceed on the ground that there

(1) 22 L. J. (Bkcy.) 62. (2) Law Rep. 2 Q. B. 41, 474.
(3) 1 M. D. & D. 358.

was a joint ownership still subsisting in the partnership property. In that case two persons who had carried on business in partnership dissolved the partnership, and gave notice of the dissolution in the *Gazette*, and by a circular to the debtors required the debts to be paid to one of the firm; and by the deed of dissolution the plant and other partnership effects were assigned to the same partner, and it was stipulated that he should pay the partnership debts, and pay to the other the value of his share of the plant and other effects. This partner became bankrupt without having paid the price of the other partner's share in the partnership effects, and it was held that, while the debts remained the property of the firm, the plant and effects were in the order and disposition of the bankrupt with the consent of the true owner and passed to the assignees. The Lord Justice *Turner*, in giving judgment, after referring to the recital of the facts in the deed of dissolution, says (1): "That recital is, to my mind, convincing evidence that these parties had come to an agreement that *Brewster* should be sole owner of the property." So that it is clear that the decision turned upon the principle that the parties had terminated the joint ownership.

The first in order of date of the cases cited in opposition was *Ex parte Cooper* (2). There two persons agreed to dissolve partnership by a particular day, and to publish a notice to that effect in the *Gazette*, stating that the debts due to the firm would be received and paid by one of them. He remained in possession of the partnership effects, but there was no assignment of them to him, and he continued to carry on the business for four months, when he became bankrupt, and it was held that the partnership property was not converted, but remained the joint property of both the partners. Accordingly the Court of Bankruptcy decided that the joint ownership continued. Sir *John Cross*, in giving judgment, said (3): "There is no question in this case but that the effects, which were joint property at the time of the dissolution, continued to be the joint property, as between the parties, up to the time of the bankruptcy; for it is not pretended that the retiring partner assigned the effects to the continuing partner; on the

(1) 22 L. J. (Bkcy.) 64. (2) 1 M. D. & D. 358.
(3) 1 M. D. & D. 363.

V.-C. M. 1875 GRAHAM v. MCCULLOCH.

contrary, it is admitted that there was no assignment or agreement to assign; and in the instrument of dissolution it is stipulated that the effects were left in the possession of *Johnston* to pay the debts of the partnership." The decision therefore turned on the fact that the joint ownership continued.

Then the other case cited was *Reynolds* v. *Bowley* (1). That was a question whether the fact of one of two partners being a dormant partner entitled the assignees of the active partner on his becoming bankrupt to the entire effects of the partnership, and it was decided in the Exchequer Chamber, reversing the decision of the Court below, that the partnership assets were not in the order and disposition of the bankrupt with the consent of the true owner. The judgment, which was very long, was based on the principle that the joint ownership never ceased.

In the present case there was a dissolution of partnership. Then the business and partnership effects were sold to *Graham*, and although there was no assignment, they became his property, because there was the order of the Court putting him in possession, and although there was power in the Court to resume possession, and the Court might have exercised the power before the bankruptcy, and in that case there would have been no case of order and disposition; yet since the Court had not done so, the business and effects remained in the order and disposition of the bankrupt, and passed to the trustee under the bankruptcy. I think, however, that each party ought to bear his own costs. The trustee will take the fund in Court and pay his own costs out of it.

Solicitors: Messrs. *Stocken & Jupp;* Messrs. *Lewin & Co.*

(1) Law Rep. 2 Q. B. 41, 474.

## FOX *v.* AMHURST.

V.-C. M.

1875

July 6.

[1873 F. 75.]

*Common Lands—Compensation—Distribution—Stint—By-laws—Lands Clauses Consolidation Act*, 1845, *s.* 104.

The copyhold tenants of a manor were entitled to common of pasture upon certain wastes and lammas lands subject to by-laws made by the homage, and such rights were preserved after enfranchisement. The last by-laws, made in 1835, provided that every copyholder and freeholder should be entitled to turn on one head of cattle for every £10 of annual value of his lands and tenements, provided that the whole number should not exceed thirty; and that every occupier of any copyhold or freehold lands should be entitled to turn on a certain number of cattle according to the rental or annual value of his lands and tenements. Portions of the common lands were taken compulsorily, and compensation for the rights of common was paid to a committee of the copyholders:—

*Held*, that such compensation was divisible among the copyhold tenants of the manor and the freeholders within the manor according to the stint fixed by the first clause of the by-laws.

THIS was a suit for the division of certain sums of money, being compensation for rights of common over land taken compulsorily.

The bill was filed by four Plaintiffs on behalf of all the copyhold tenants of the manor of *Hackney*, called "*Lordshold*," and the owners of enfranchised copyholds within the same manor. The Defendants were the trustees of the funds paid by way of compensation, one of them being also the lord of the manor. The manor included certain commons and wastes, one of which was called *Newington Common*, and certain lammas lands, two of which were called *Hackney Marsh* and *Hackney Downs*.

The lammas lands were owned in severalty during the close portion of the year, as to part by the lord of the manor, as to other parts by various copyholders, and as to the residue by various freeholders; and the lammas lands during the open portion of the year, and the commons or wastes during the whole year, formed a common pasture under the management of the homage of the manor, who had from time to time made by-laws respecting it at their general Courts.

In the reign of *James* I. an arrangement was made between

V.-C. M. 1875 Fox v. Amhurst.

Lord *Wentworth*, the then lord of the manor and of the adjacent manor of *Stepney*, and the bulk of his copyhold tenants, which was embodied in an indenture with a schedule of the rights of the copyholders, and was confirmed by a decree of the Court of Chancery and a private Act of Parliament. This arrangement included a provision that the copyholders after enfranchisement should enjoy the like common of pasture as before; and the schedule contained articles which provided that the homage should yearly choose certain customary tenants to be drivers and viewers of the wastes and commons of the manors, who were to have authority to drive the commons at any time when they found them surcharged, and to impound the cattle so taken. And that the copyhold and customary tenants should make by-laws at their general Courts when need should require, and the said by-laws were to bind all the copyhold tenants of the manors.

The homage accordingly made by-laws from time to time, the last occasion being the 28th of April, 1835, when by-laws were passed in the following words:—

"That every copyholder and freeholder of lands and tenements within this manor shall be entitled to common of pasture for one head of cattle for every £10 annual value of his said lands and tenements: Provided always that the whole number to any one copyholder or freeholder shall not exceed thirty, and that such copyholder or freeholder shall, on or before the 12th day of August in every year, claim such right, in default of which claim the same shall be transferable to the occupiers of such lands or tenements respectively in rateable proportions in addition to their own rights as occupiers.

"That every occupier of any copyhold or freehold lands or tenements within this manor shall be entitled to common of pasture when his or her rent or annual value is at or under £10 a year to three head of cattle, £15 to six, £20 to nine, £25 to twelve, £30 to fifteen, £35 to eighteen, £40 to twenty-one, £45 to twenty-five, £50 to thirty, and one head only for every £5 above £50."

By the 10 Geo. 4, c. 117, the *East London Waterworks Company* were empowered to take a portion of *Hackney Marsh* for the pur-

poses of their undertaking; and the 24th section of the Act recited that this land was a portion of the lammas lands of the aforesaid manor, and directed one gross sum to be ascertained for the aggregate value of all the rights of common of pasture over the same land, and paid to six copyholders named in the Act, to the intent that it should be laid out in the purchase of other land to be attached to the lammas lands.

A sum of money was paid accordingly under this Act, but it was found impossible to purchase other land, owing to the great value of land in the neighbourhood, and the fact that the money only represented rights of common during a portion of the year, and no one would subject land to such rights.

A further portion of *Hackney Marsh* was taken under the *Lea Navigation Improvement Act*, 1850; and portions of *Hackney Downs* and *Newington Common*, the former lammas land, and the latter manorial waste, were taken under the *Great Eastern Railway (Metropolitan Station and Railways) Act*, 1864. Each of the two last-mentioned Acts incorporated the *Lands Clauses Act*, 1845 (8 Vict. c. 18), which, after directing the appointment of a committee of commoners and the payment to such committee of the compensation for the rights of common in the lands taken, provides by the 104th section in the following words: "And such compensation when received shall be apportioned by the committee among the several persons interested therein according to their respective interests."

Sums amounting to upwards of £2000 were paid under these Acts to committees of the copyholders, the last sum being paid in February, 1873, and the bill was filed in the July following. A petition was brought on with the suit, praying that the fund in Court might be carried to the credit of the suit, which was ordered accordingly.

At the hearing it was considered that, under the above circumstances, all the freeholders within the manor must be considered as standing in the position of enfranchised copyholders, and inquiries were accordingly directed to ascertain who were the freeholders within the manor, as well as who were the copyhold tenants of the manor, and whether they elected to take the first of the above-mentioned funds, which was called the Waterworks Fund, in

V.-C. M. 1875 Fox v. Amhurst.

money, instead of having it laid out in land, and what were the annual values of their respective tenements.

Advertisements were issued accordingly, and claims were sent in on behalf of 142 copyholders and 41 freeholders, who all elected to take the Waterworks Fund in money, and proved the values of their various tenements. The Chief Clerk also made a list of thirty-four other freeholders, whose names occurred in various enfranchisement deeds, but who had put in no claim. The copyholders were included in the first schedule to the Chief Clerk's certificate, the forty-one freeholders who claimed, in the first part of the second schedule, and the thirty-four names of persons who did not claim, in the second part of the second schedule.

The trustees of a charity, called *Sir John Cass's Charity*, were one of the largest landowners within the manor, the annual value of their estates being about £30,000, and it was arranged that they should appear at the hearing on further consideration, and urge the view most favourable to the large landholders. In like manner, one of the other claimants appeared to support a view more favourable to some of the small holders.

The cause now came on for further consideration.

Mr. *J. Pearson*, Q.C., and Mr. *Tyssen*, for the Plaintiffs:—

We contend that the fund should be divided amongst the tenants of the manor according to the stint fixed by the first clause in the by-laws. That is to say, each tenant should take one share for every £10 of annual value of his tenement up to £300; all over £300 should take thirty shares, and all under £10 one share.

This view is supported by the analogy to be drawn from sect. 22 of the *General Inclosure Act*, 8 & 9 Vict. c. 118. That Act authorizes a certain proportion in number and value of a body of commoners to make an application to have the benefit of the Act; and then defines how the proportional value of the interests of various commoners shall be estimated in the different cases, one of which is, that in case such interests shall be in respect of rights in a gated or stinted pasture, or of other rights defined by numbers or stints, the estimate shall be made "according to the proportional amounts of their respective numbers or stints."

As to the thirty-four freeholders whose names occur in enfran-

chisement deeds, we submit that as they have not claimed they should be omitted. The lands may have been alienated since the enfranchisement, and as we know that enfranchisements are frequently made in view of sales, it is most probable that many of them have been so alienated.

Mr. *Glasse*, Q.C., and Mr. *Franklen*, for the Defendants, the trustees, took no part in the argument as to the principle of division.

Mr. *B. B. Rogers*, and Mr. *Finch*, for *Sir John Cass's Charity*:—

We contend that the fund should be divided, not in proportion to the number of cattle that each tenant might turn on of his own, but in proportion to the total number that might be turned on by each tenant and his under-tenants together. The second clause of the by-laws gives a right to the under-tenants, and though that right could not be reserved by a lessor, nevertheless its existence enhances the letting value of the land, and so benefits the lessor, and on the right being impaired by loss of some of the common land, the lessors should be proportionately compensated accordingly. We submit that this view is supported by *Nash* v. *Coombs* (1).

Mr. *Maclaren*, for some of the owners of land not built upon:—

We are holders of land, not houses, and it is for the persons having land upon which the cattle can be levant and couchant that the right of pasturage attaches. When a man builds over his land, he loses the right to depasture cattle. It was held in *Benson* v. *Chester* (2) that a claim of a right of common without stint as annexed to an ancient messuage without land, could not, as such, exist at law. The right of common was a right restricted by levancy and couchancy, and in that case, as the Defendant did not use the common in right of any messuage and land in the parish on which the cattle could be levant and couchant, he surcharged the common. It was also held in *Scholes* v. *Hargreaves* (3) that common for cattle levant and couchant could not be claimed by prescription as appurtenant to a house without any curtilage or

(1) Law Rep. 6 Eq. 51. (2) 8 T. R. 396. (3) 5 T. R. 46.

V.-C. M. 1875 Fox v. Amhurst.

land. So in *Carr* v. *Lambert* (1) it was held that a right of common exercised in respect of a tenement formerly in a condition to support cattle, but since turned to different purposes, was not extinguished or suspended by reason of such change in the condition of the tenement, if the tenement was still in such a state that it might easily be turned to the purposes of feeding cattle.

We therefore claim, on behalf of those tenants of the manor who have land upon which cattle can be levant and couchant, to have the sole right to share in this fund.

Mr. *J. Pearson* was not called upon to reply, but referred the Court to a note by the editor to the case of *Scholes* v. *Hargreaves* (2) to this effect: "In *Richardson* v. *Squibb* (3) it was ruled by *Holt* that if a man prescribe for common for a certain number of cattle as appurtenant, &c., it is not necessary or material to shew they were levant and couchant, because it is no prejudice to the owner of the soil, for that the number is ascertained.

Sir R. Malins, V.C.:—

In this case it appears that part of the common land has been taken by different companies, and the only question is in what proportion the money payable in respect of the land so taken should be divided between the persons who have common rights upon the land. In the ordinary case of property taken by a company under an Act of Parliament, the purchase-money would be payable to the owners of the property: but in this case the persons having common rights have the same title to the money produced by the sale of the common as if the land had remained unsold. That right is prescribed by certain by-laws made on the 28th day of April, 1835. By these by-laws it is provided: "That every copyholder and freeholder of lands and tenements within the manor shall be entitled to common of pasture for one head of cattle for every £10 annual value of his lands and tenements: Provided always, that the whole number to any one copyholder or freeholder shall not exceed thirty, and that such copyholder or freeholder shall on or before the 12th day of August

(1) Law Rep. 1 Ex. 168. (2) 5 T. R. 46.
(3) 1 Ld. Raym. 726.

in every year claim such right, in default of which claim the same shall be transferable to the occupiers of such lands or tenements respectively in rateable proportions, in addition to their own right as occupiers." That clause, therefore, provides against any overwhelming influences by persons who may hold property of great value, and such persons will not have a right to pasture more than thirty head of cattle. It applies only to those who are not occupiers of land. Then comes the following clause, which is this: "That every occupier of any copyhold or freehold lands or tenements within this manor shall be entitled to common of pasture when his or her rent or annual value is at or under £10 a year to three head of cattle, £15 to six," and so on in the proportion of three head of cattle for every £5 of value up to £50, and one head only for every £5 of value above £50.

It has been argued on behalf of the charity that, as they represent property worth £32,000, they are entitled as owners and occupiers to turn in 6200 head of cattle in respect of their annual rental.

If they are owners of any land the first clause applies; but if they are occupiers then they will be entitled under the latter clause. In my opinion, the money must be divided among the copyholders and freeholders according to the provisions of the first clause—that is, among the persons named in the Chief Clerk's certificate, omitting the freeholders who did not claim. The Plaintiff's contention is, therefore, right, and the decree will be to tax the costs of the Plaintiffs and Defendants and other parties appearing at this hearing, as between solicitor and client, allowing to the Defendants the trustees any charges and expenses properly incurred by them, and allowing to each of the other claimants who have put in a claim the sum of £2 2*s.* for costs, and pay all costs.

Declare the residue of the fund divisible between the freeholders and copyholders named in the first schedule, and the first part of the second schedule to the Chief Clerk's certificate, according to the stint of tenants of the manor, that is, each claimant to have one share for every £10 of annual value up to £300; any under £10 to have one share, and any over £300 to have thirty shares.

Direct the Chief Clerk to apportion the fund according to the

V.-C. M. 1875 Fox v. Amhurst.

above direction, and pay the shares to the parties in the first schedule and the first part of the second schedule, carrying the shares of any who do not apply for payment to their separate accounts.

Solicitors for the Plaintiffs and the Trustees: Messrs. *Chester & Sons.*

Solicitors for *Sir John Cass's Charity:* Messrs. *Glynes, Son, & Church.*

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V.-C. M. 1875 July 7.

## FIELDEN *v.* ASHWORTH.

[1874 F. 60.]

*Construction of Will—Distribution among Relatives—Statute of Distributions.*

Gift of residue to be distributed "to my relatives, share and share alike, as the law directs."

*Held* to mean a distribution under the *Statute of Distributions, per stirpes* and not *per capita.*

*JAMES HODGSON,* by his will dated in June, 1862, gave and bequeathed "the whole of my property, wheresoever situated, to my executors and trustees of this my will on trust, and I request them to pay all my just debts and funeral expenses, and then distribute the residue to my relatives, share and share alike, as the law directs."

A question was now raised upon further consideration whether under this will the distribution of the property was to be among all the testator's relatives in equal shares, or whether it was to be in such proportions among the relatives of different degrees, as directed by the *Statute of Distributions.*

Mr. *Freeman,* for the trustees and executors, submitted the question to the Court, and stated that if the estate went according to the *Statute of Distributions* it would be divided into four shares, but if it went equally to each of the relatives it must be divided into eleven shares.

Mr. *Stallard,* in support of a distribution *per capita*:—

The principle which should govern the construction of these

words is well laid down in *Jarman* on Wills (1), where it is stated, "A gift to relations is regulated by the *Statute of Distributions* only so far as regards the ascertainment of the objects of the gift. The statute does not determine the proportions in which they take, consequently the property is distributed *per capita*, or equally among the several individual objects of every degree, not *per stirpes*, or proportionally among the stocks. A contrary proposition has indeed been advanced, chiefly on the authority of *Pope* v. *Whitcombe* (2), which, however, it is now discovered decides no such point: *Sugden* on Powers (3). The objects once ascertained take *per capita*."

It was so held in *Thomas* v. *Hole* (4), where there was a gift of £500 to relations, to be equally divided between them. There it was confined to such as would take by the *Statute of Distributions*, but their shares were to be divided *per capita*. The same rule prevailed in *Richardson* v. *Richardson* (5). The words "unto and amongst" are equivalent to share and share alike; therefore if this gift had been to relatives according to the statute, share and share alike, it would have been precisely the same as *Richardson* v. *Richardson*. The principle is not altered by the addition of "as the law directs," which can only mean "to my relatives as the law directs by the statute, share and share alike." The distribution should, therefore, be amongst all the relatives within the statute, to be divided *per capita*.

Mr. *Everitt*, in support of the opposite view, was not called upon, but cited *Booth* v. *Vicars* (6), where the testator gave the residue of personal estate, after the death of *A.* and *B.*, to be divided to and amongst the respective next legal representatives of *A.* and *B.*, share and share alike, and it was held that the next of kin of *A.* and *B.*, according to the statute, were entitled *per stirpes*.

SIR R. MALINS, V.C.:—

The question turns upon these few words, "to distribute the residue to my relatives, share and share alike, as the law directs."

(1) 3rd Ed. vol. ii. p. 109.
(2) 3 Mer. 689.
(3) 7th Ed. vol. ii. pp. 246, 605.
(4) Cas. t. Tal. 251.
(5) 14 Sim. 526.
(6) 1 Coll. 6.

In Finch v. Hollingsworth 21 Beav. 932. 1 Jur. N.S. 718

V.-C. M. 1875 FIELDEN v. ASHWORTH.

If it had been merely a gift to the relatives, share and share alike, then the relatives would have included only those under the statute—a class easily ascertained—and it would have made them take *per capita* and not *per stirpes;* but he adds, "as the law directs." What does he mean by this? Does he mean that the relatives are to take share and share alike, or does he mean them to take as the law directs under the *Statute of Distributions?* I think the intention of the testator was that, not having made up his mind how to divide his property, and probably not knowing exactly how it would go under the *Statute of Distributions,* he thought it better to leave it entirely to the law, having confidence that it would then be divided in the most proper manner. The only mode of effecting this object is to disregard the words "share and share alike," and direct the property to be divided as the law directs—that is, according to the *Statute of Distributions.*

Solicitors for all parties: Messrs. *Hughes & Beadles.*

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V.-C. M. 1875 *July* 7.

## BEER *v.* LONDON AND PARIS HOTEL COMPANY.

[1875 B. 196.]

*Contract for Sale—Specific Performance—Company—Secretary—Authorized Agent—Statute of Frauds—Auctioneer.*

Ch D. 655. 661. 39 & 40 Vict. c. 33 s. 128

An agreement to sell property to the Plaintiff was signed for a company by the secretary, who was alleged to be their authorized agent. The agreement was made subject to conditions of sale, and it was alleged that the vendors therein described referred to the company. The conveyance was prepared for execution when the company was ordered to be wound up, and the liquidator repudiated the contract on the ground that the secretary was not an authorized agent for the purpose of sale:—

*Held,* on demurrer, that the allegations in the bill were sufficient to shew that the secretary was the authorized agent for the purpose of executing the contract, both within the *Statute of Frauds* and the *Companies Act,* 1867.

*Semble,* that a contract signed by an auctioneer on behalf of an undisclosed proprietor is a valid contract under the *Statute of Frauds.*

### DEMURRER.

The bill, which was filed by *Julius Beer,* stated as follows:—

The *London and Paris Hotel Company* was incorporated on the 29th of May, 1863. Their objects, as declared by the memorandum of association, were, amongst other things, "the purchasing, selling, or otherwise dealing with hotels, houses, and landed or other property, and any part of the same respectively." In the year 1874 the company were owners of certain leasehold premises, No. 54, *St. James's Street*, which were held under a lease expiring in September, 1889, at a reserved rent of £375 per annum, and No. 9, *Bennett Street*, which was held under lease, expiring at Lady Day, 1886, at a reserved rent of £420 per annum, with the benefit of a portion of No. 8 which was used as a back staircase, and upon which £100 per annum was paid, the whole being subject to an underlease for an unexpired term of six years from the 1st of April, 1874. The rent reserved in this underlease was £1500 per annum. In April, 1874, the company were desirous of selling their interest in these premises, and the property was offered for sale by auction on the 16th of April, 1874, but no bid was made, and the property remained unsold.

On the 14th of July, 1874, Mr. *Charles John Phipps*, as agent for the Plaintiff, called on Dr. *Reed*, the chairman of the company, in order to arrange for the purchase of the premises by private contract. Dr. *Reed* not being at home, Mr. *Phipps* wrote to him the following letter:—

"I called on you this afternoon respecting the properties leased by the company, of which you are chairman. I understand you wish to part with your fifteen years' lease. If so, I shall be happy to give you £2000 for all the interests the company have in these two premises. I have written to Mr. *Baker*, and should be glad to hear from you on Friday."

The Mr. *Baker* referred to in the above letter was the secretary of the company, and the following letter was sent to him by Mr. *Phipps* on the 14th of July, 1874:—

"Will you ascertain for me the exact price at which your company will sell their interest under the two leases of No. 54, *St. James's Street*, and 9, *Bennett Street?* I have called upon Dr. *Reed*, but he was out. Perhaps you could call a meeting and let

V.-C. M. 1875 BEER v. LONDON AND PARIS HOTEL COMPANY.

me know what time you will see me either Friday or Saturday, To shew you that I am not asking for mere curiosity, I beg to offer you £2000 for all the interests of the company."

On the 17th of July, 1874, Mr. *Phipps*, as such agent as aforesaid, saw Messrs. *Combe & Wainwright*, the company's solicitors, on the subject of the proposed purchase, and was informed by them that, as the fact was, the company would sell the premises for the sum of £2500. In truth, the directors of the company had on its behalf, and in exercise of the powers conferred on them by the articles of association, determined to accept that sum, and their determination was expressed in a resolution entered on the minutes of the board.

On the same day Mr. *Phipps*, on the Plaintiff's behalf, wrote to Messrs. *Combe & Wainwright* a letter dated the 17th of July, 1874, of which, omitting formal parts, the following is a copy:—

"Referring to our conversation to-day relative to the leaseholds of the premises No. 9, *Bennett Street*, and No. 54, *St. James's Street*, now held by the *London and Paris Hotel Company*, being the property put up for sale by Mr. *Marsh* on April 16th, 1874, I beg to say that my clients, the freeholders of *Crockford's*, accept your offer to sell the same for the sum of £2500, and they will become purchasers at that price. Kindly send me a letter by return to ratify the above, when I will instruct our solicitors to accept the abstract of title from you."

On the 18th of July, 1874, Messrs. *Combe & Wainwright*, on behalf of the company, sent to Mr. *Phipps* an agreement to be signed by him on behalf of the Plaintiff. This agreement was partly printed on and partly written on the back of the "particulars and conditions of sale" which had been prepared for the aforesaid attempted sale by auction, such "particulars and conditions of sale" and agreement constituting one entire document. This document set out the interest of the vendors in the beforementioned premises, and it provided for the delivery by the vendors of the abstract of title, including an agreement made between *Lionel Lawson* and *Julius Beer* of the one part, and the *London and Paris Hotel Company* of the other part, and that no

requisition should be made in respect of that agreement; and this document also contained a statement that the particulars and conditions of sale, and plans, might be obtained of Messrs. *Combe & Wainwright*, solicitors. The name of the company did not appear.

The bill then stated that the term "vendor," wherever used in the particulars and conditions, was intended to refer to the company, who were, in fact, the vendors of the premises. The agreement on the back of the particulars and conditions was in the following terms:—

"I, *Charles Phipps*, hereby acknowledge that I have this day purchased the property mentioned and described in the particulars of sale at or for the sum of £2500. I hereby agree and bind myself, and my executors and administrators, to complete this my said purchase in accordance with and subject to the foregoing particulars and conditions of sale, so far as such conditions are applicable to a sale by private contract.

"Dated the 19th day of July, 1874."

Mr. *Phipps* wrote into the said agreement his name and address, and signed his own name thereto. In this he acted, as he had done throughout, to the full knowledge of the company, as the agent of the Plaintiff. Mr. *Phipps* at once forwarded the agreement thus signed to Messrs. *Combe & Wainwright* on behalf of the company, and they, on the 20th of July, 1874, acknowledged its receipt. On the same day Messrs. *Combe & Wainwright* wrote to Mr. *Phipps* stating that they had seen the secretary of the company, and had gone into the matter with him, and he had suggested that a question might arise about the staircase which would require consideration, but as the subject did not appear to the Plaintiff so to affect him as to render necessary any delay in executing the contract, and Messrs. *Combe & Wainwright* having been informed of this, they handed Mr. *Phipps*, as the Plaintiff's agent, an agreement in the form set out, and also written on the back of the particulars and conditions of sale, and signed on behalf of the company by Mr. *Baker*, the secretary, who was their authorized agent, the signature being "*A. Martin Baker*, Secretary—For the *London and Paris Hotel Company, Limited.*"

On the 6th of August, 1874, the abstract of title was forwarded

V.-C. M. 1875 BEER v. LONDON AND PARIS HOTEL COMPANY.

by Messrs. *Combe & Wainwright* to Messrs. *Freshfields & Williams*, the Plaintiff's solicitors, for perusal.

It was then found that the property was, together with other property, subject to a mortgage for £3000 to the *Alliance Bank*, and arrangements were made with the mortgagees, who consented to join in the assignment.

After some delay occasioned by the company, the title was accepted, and the assignment was prepared and approved, and the *Alliance Bank*, as well as the company and Plaintiff, were ready to execute the same.

On the 12th of January, 1875, the assignment was engrossed and forwarded to Messrs. *Combe & Wainwright* for execution. But on the 15th of January, 1875, the Plaintiff received an intimation through his solicitors from Messrs. *Combe & Wainwright* that a petition for winding up the company was pending, but that they hoped it would shortly be dismissed. The completion of the purchase was, therefore, postponed pending the hearing of the petition.

On the 12th of March, 1875, an order was made that the company be wound up by the Court under the provisions of the *Companies Acts*, 1862 and 1867, and on the 24th of March, 1875, an order was made appointing *Frederick Maynard* the official liquidator of the company.

As soon as the Plaintiff was aware of Mr. *Maynard's* appointment he applied to him, through Messrs. *Freshfields & Williams*, on the subject of his purchase.

A correspondence on the subject ensued between Messrs. *Freshfields & Williams* and Messrs. *Davidson & Co.*, who acted as the official liquidator's solicitors, and in the result Mr. *Maynard* repudiated the Plaintiff's contract.

The contract was in all respects fair and reasonable, and not only was it expressly approved as aforesaid, but the price agreed to be given by the Plaintiff, viz., £2500, was that fixed as the reserve price on the sale by auction.

Mr. *Maynard* had refused to complete the purchase made by the Plaintiff, and threatened and intended, unless restrained, to sell the said premises, and assign to some person other than the Plaintiff, with the view to defeat his rights.

The bill was filed with the leave of the Court in the winding-up.

The bill prayed specific performance of the agreement; that the Defendants might be restrained from selling and offering for sale the hereditaments and premises comprised in the said agreement, and from assigning the same to any person other than the Plaintiff.

A demurrer to the bill was put in by the official liquidator on the ground of want of equity; and further, that it appeared by the bill that neither the agreement nor the contract which was alleged by the bill, and of which the Plaintiff by the bill sought to have the benefit, nor any memorandum or note thereof, was ever reduced into writing, or signed or sealed by the Defendant company, or any person lawfully authorized thereunto, within the meaning of the *Statute of Frauds* (29 Car. 2, c. 3).

Mr. *Higgins*, Q.C., and Mr. *Crossley*, for the demurrer:—

There are no allegations in this bill of a contract for sale which would be binding on the company. The bill avoids setting forth the articles of association of the company. There is no power under the Companies Acts to sell property, unless the sale is ratified by the company. When there are articles of association, the title must be deduced under them. The secretary, *Baker*, could have no power to execute a contract for sale unless he had express authority given to him by the company to do this particular act. The bill alleges that the secretary was the authorized agent of the company, but it does not allege he was authorized in this behalf. In *Cartmell's Case* (1) the directors of a company, who had power to purchase shares in the company, appointed a manager under the power given to them by the articles of association. The manager purchased shares from a shareholder, and a transfer was executed by the shareholder to two directors, who were trustees for the company. The transfer was registered, but it was not executed by the directors. It was there held that the directors had no authority to delegate to a manager the power to buy shares, and that the transfer was invalid.

There is no allegation of a contract such as will satisfy the

(1) Law Rep. 9 Ch. 691.

V.-C. M. 1875 BEER v. LONDON AND PARIS HOTEL COMPANY.

requirements of the *Statute of Frauds*. The words of the statute are, that no action shall be brought upon any contract or sale of lands, tenements, or hereditaments, or any interest in or concerning them, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized. This is not a contract signed by the party to be charged therewith, or by any other person thereunto by him lawfully authorized.

The term "vendor" is not of itself a sufficient description of one of the parties to a contract. That was decided in the case of *Potter* v. *Duffield* (1).

It is therefore necessary that the contract should contain the name of the contracting parties, or such a description of them as that the identity cannot be disputed.

That case was discussed in *Commins* v. *Scott* (2), where the Master of the Rolls said he saw no reason to alter the opinion he had expressed in *Potter* v. *Duffield*. *Commins* v. *Scott* was decided upon a question of evidence, as to whether the description given of the vendor was sufficient for the purpose of identity. There is nothing upon the face of this contract, or upon the particulars and conditions of sale, to shew who the vendor was; the contract does not, therefore, satisfy the *Statute of Frauds*.

Mr. *Glasse*, Q.C., and Mr. *Kekewich*, in support of the bill:—

The principal object for which this company was formed was the purchasing, selling, or otherwise dealing with hotels, houses, and landed or other property; therefore when the sale was made it was within the ordinary business of the company. The secretary of a company is authorized to transact the business of the company on their behalf, and he was fully authorized to enter into this contract. But the contract was signed on the printed form at the back of the conditions and particulars of sale, making them part of the contract. The property was put up for sale by the company, and the Plaintiff, by his agent, communicated with the chairman of the company, and informed him that he had also written to Mr. *Baker*, the secretary. He afterwards wrote and

(1) Law Rep. 18 Eq. 4. (2) *Ante*, p. 11.

communicated with the solicitors of the company, who were their authorized agents. Then it is alleged in the bill that the vendors, wherever mentioned in the conditions of sale, meant the company. This is admitted by the demurrer, and consequently the company are distinctly made the vendors. It is also alleged that the secretary was the authorized agent; the words of the *Statute of Frauds*, "thereunto lawfully authorized," are not actually used, but they are distinctly inferred, since there is no other matter alluded to for which he was their lawfully authorized agent except the sale of this property; and parol evidence may be given to shew for whom a person is agent: *Morris* v. *Wilson* (1). If this had been a sale by auction, as at first intended, the auctioneer would have been the authorized agent of the vendors to sign the contract, although the name of the vendor was not disclosed. This is a matter occurring in every day's practice, for it is seldom that the name of the vendor is disclosed upon a sale by auction. But the sale took place after the auctioneer had failed to obtain a bidding. This was the case in *Commins* v. *Scott* (2), where the contract for sale was signed by the agent of the vendor subject to the conditions of sale, which did not disclose the name of the vendor; but it was held that there was sufficient evidence to shew who the vendor was, and the Master of the Rolls was of opinion that there was a good contract, and overruled the demurrer to a bill for specific performance. The word "vendor" is as good a description of one of the contracting parties as the term "executor," which was held sufficient in *Hood* v. *Lord Barrington* (3), or "proprietor," as in the case of *Sale* v. *Lambert* (4).

There is another ground upon which we say this contract may be enforced. By the 37th section of the *Companies Act*, 1867 (30 & 31 Vict. c. 131), it is provided that any contract which if made between private persons would be by law required to be in writing, and signed by the parties to be charged therewith, may be made on behalf of the company, in writing, signed by any person acting under the express or implied authority of the company. There can be no doubt, upon the facts set out in this bill, that the secretary who signed this contract did so while acting

(1) 5 Jur. (N.S.) 168.
(2) *Ante*, p. 11.
(3) Law Rep. 6 Eq. 218.
(4) Ibid. 18 Eq. 1.

V.-C. M. 1875 BEER v. LONDON AND PARIS HOTEL COMPANY.

under the express or implied authority of the company. Under all these circumstances, there is no ground on which the demurrer can be sustained.

Mr. *Higgins*, in reply:—

The *Statute of Frauds* requires that an agreement for the sale of lands shall be in writing. This was explained in *Williams* v. *Lake* (1) to mean that the essentials of the agreement must be stated in writing, and amongst them are the names of the contracting parties. Here we have a contract with one of the contracting parties neither named nor described. The same law is laid down in *Williams* v. *Byrnes* (2). As to the *Companies Act* of 1867, there is nothing to shew that *Baker* was a person acting under the express or implied authority of the company.

SIR R. MALINS, V.C.:—

This is a bill filed for the specific performance of a contract to purchase a house in *St. James's Street* which is the property of the *London and Paris Hotel Company*, and I ought to be very certain that the Plaintiff cannot sustain his case of there being a binding contract before I allow the demurrer to such a bill, because if I allow the demurrer the case is entirely out of Court, and the Plaintiff loses every opportunity of amending his case and bringing forward materials to shew that there is a contract; nor can I say that the transactions mentioned in this bill give me any inclination whatever to allow the demurrer. The allegations in the bill admitted, of course, to be correct by the demurrer are these:—"The Defendants"—that is, the *London and Paris Hotel Company*—"were incorporated by registration under the *Companies Act*, 1862, on the 29th of May, 1863. Their objects, as declared by the memorandum of association, were, amongst other things, the purchasing, selling, or otherwise dealing with hotels, houses, and landed or other property, and any part of the same respectively." In the month of April, 1874, the company, whose business it was to buy and sell houses, and so forth, "were desirous of selling their interest in certain leasehold premises of which they were the owners, and the property was offered for sale by public auction on

(1) 2 E. & E. 349. (2) 9 Jur. (N.S.) 363.

the 16th of April, 1874, but no bid was made, and the property remained unsold." Upon that allegation I must say it was the company who were desirous of selling—the company offered their interest for sale; and that, therefore, was done by the express authority of the company. Here is, therefore, a company desirous of selling, and they take the usual means of selling, namely, they employ an auctioneer, who puts the property up for sale by public auction. The company shewed their desire to sell; and I may add that a subsequent paragraph shews that the reserved bidding fixed at the sale was £2500. The company, therefore, were not only desirous of selling, but they took the necessary measures to sell, and they fixed the price at which they were willing to sell; and if £2500 had been bid at the auction, it is perfectly clear that upon the auctioneer, by the authority of the company, knocking down the hammer on a bid, it would have been conclusive on the vendors, as a contract which could have been enforced against them. Then the property not having been sold, but the company still desiring to sell it, "on the 14th of July, 1874, Mr. *Charles John Phipps*, as agent for and on behalf of the Plaintiff, called on Dr. *Reed*, the chairman of the company, in order to arrange for the purchase of the said premises by private contract." Dr. *Reed* was not at home when Mr. *Phipps* called, and Mr. *Phipps* the same day wrote him a letter, a copy of which is set out in the bill. The letter to Mr. *Baker* is also set out, in which he offers the sum of £2000 for the interest of the company in the premises. Then, "on the 17th of July, 1874, Mr. *Phipps*, as such agent as aforesaid, saw Messrs. *Combe & Wainwright*, the company's solicitors, on the subject of the proposed purchase, and was informed by them that the company would sell the premises for the sum of £2500," which is the very price which the bill states they had fixed as the reserve price at the auction. On the same day Mr. *Phipps*, on the Plaintiff's behalf, wrote to Messrs. *Combe & Wainwright* a letter dated the 17th day of July, 1874, in which the offer is accepted by Mr. *Phipps*. Here are the owners of the property desirous of selling it for £2500; and the proposed purchaser now says, "I will take your own terms. I will become the purchaser at the price you demand for it, namely, £2500." Then, "on the

V.-C. M. 1875 BEER v. LONDON AND PARIS HOTEL COMPANY.

18th of July, 1874," *Combe & Wainwright*, who are the solicitors of the company, and who must be presumed to know something about the interest of the company and their wishes, sent to Mr. *Phipps* an agreement, to be signed by him on behalf of the Plaintiff. Could I suppose that Messrs. *Combe & Wainwright* would have prepared an agreement to be signed on behalf of the Plaintiff unless they knew perfectly well that their employers, the company, were desirous of selling the property? This agreement was partly printed on and partly written on the back of the particulars and conditions of sale which had been prepared for the aforesaid attempted sale by auction, such particulars and conditions of sale and agreement constituting an entire document. This document states the particulars and conditions of sale of the leasehold interest of the vendors in the property, which is fully described; and there are various conditions stated, amongst others the fourth, providing that the vendors should, within seven days, deliver to the purchaser or his solicitor an abstract of title to the property, which was to comprise an agreement made between *Lionel Lawson* and *Julius Beer* of the one part, and the *London and Paris Hotel Company, Limited*, of the other part. Then there is an allegation in this bill, which is admitted by the demurrer to be true, that "the term 'vendors,' wherever used in the said particulars and conditions, is intended to refer to the company, who were in fact the vendors of the said premises"—that is, the Defendants, the *London and Paris Hotel Company*. Therefore I must read it thus: "made the 1st day of September, 1873, between *Lionel Lawson* and *Julius Beer* of the one part, and the *London and Paris Hotel Company, Limited*, who were the vendors, of the other part." The word "vendors," by the admission, where it is necessary to read it so, meant that the *London and Paris Hotel Company* were the vendors. The parties having agreed that one would give, and the other accept, £2500 for the purchase and sale of the property, an agreement was come to to purchase the property in accordance with and subject to the foregoing particulars and conditions of sale, so far as such conditions are applicable to a sale by private contract.

Now, the law is thoroughly well settled, that, in accordance with

the *Statute of Frauds*, all you want to constitute a binding contract is a memorandum of the terms of the contract, signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized. Mutuality is not necessary. If the vendor signs, he is bound, although the purchaser has not signed anything; and if the purchaser signs, he is bound, although the vendor has not signed anything. In this case there is no doubt whatever that Mr. *Phipps*, as the agent of the Plaintiff, would have been bound by this contract, although the vendors had done nothing to bind themselves. In that state of things "Mr. *Phipps* wrote into the said agreement his name and address, and signed his own name thereto. In this he acted, as he had done throughout, to the full knowledge of the company, as the agent of the Plaintiff." Then "Mr. *Phipps* at once forwarded the agreement thus filled up and signed to Messrs. *Combe & Wainwright* on behalf of the company, and they, on the 20th of July, 1874, acknowledged its receipt as follows:—'We have received agreement signed by you, and will forward you one signed on behalf of the company before handing over the one signed by you.'" Can anything be more clear? It is a distinct continuance of the desire of the company to sell the property at the price of £2500. Then, "on the same 20th July Messrs. *Combe & Wainwright* wrote to the Plaintiff a further letter, stating that they had seen the secretary of the company, and had gone into this matter with him, and he thought they should see Mr. *Phipps* again upon a question as to the staircase." It is of no consequence what that question was, for the bill states, "On consideration the question of the staircase did not appear to the Plaintiff so to affect him as to render necessary any delay in executing the contract, and Messrs. *Combe & Wainwright* having been informed of this, handed Mr. *Phipps*, as his agent, an agreement in the form above set out, and also written on the back of such particulars and conditions of sale as aforesaid, and signed on behalf of the company by Mr. *Baker*, the secretary, who was their authorized agent." Therefore the allegation in the bill is that a copy of the contract was handed to the Plaintiff signed by Mr. *Baker*, the secretary of the company, who was their authorized

V.-C. M. 1875 BEER v. LONDON AND PARIS HOTEL COMPANY.

agent. Now, what was he their authorized agent for? What was the kind of negotiation that was going on? What was it they wanted to carry into effect? A contract by which one bought and the other sold this property in *St. James's Street.* Therefore I am of opinion, when it says it was signed "by Mr. *Baker*, the secretary, who was their authorized agent," that that means their authorized agent in the only matter referred to in this bill—their authorized agent to sign that contract to bind the company to do that which they were desirous of doing, namely, to sell this property for £2500. The signature was in the following form:—"*A. Martin Baker*, Secretary—For the *London and Paris Hotel Company, Limited*," who are admitted by this demurrer to be the vendors of the property. It was therefore a contract unquestionably signed by the Plaintiff, that is, signed by his agent lawfully authorized; and here is an allegation of a contract signed by the vendors, or by Mr. *Baker*, on their behalf, duly authorized; because I must assume he could not be their agent unless he was duly authorized. He is the secretary, and he signs it "for the *London and Paris Hotel Company, Limited.*" Having been perfectly aware that a contract had been signed, they now proceed to carry this contract into effect, and "on the 6th of August, 1874, the abstract of title was forwarded by Messrs. *Combe & Wainwright* to Messrs. *Freshfields & Williams*, the Plaintiff's solicitors, for perusal." Here, again, therefore, the vendors, having intended to sell, having, in the manner I have pointed out, bound themselves to sell, proceed to carry the contract into effect, doing the very first act necessary, namely, delivering an abstract of title by the duly authorized solicitors of the company, who by this demurrer are admitted to be so, and acting in that and in no other capacity. A difficulty was then raised as to a mortgage for £3000, to which the property was subject, to the *Alliance Bank*, and arrangements were made with the mortgagees, who consented to join in the assignment. After some delay occasioned by the company, the title was accepted, and the assignment was prepared and approved, and the *Alliance Bank*, as well as the company and the Plaintiff, was ready to execute the same. On the 12th of January, 1875, the assignment was engrossed and forwarded to Messrs.

*Combe & Wainwright* for execution. But on the 15th of January, 1875, the Plaintiff received an intimation through his solicitors from Messrs. *Combe & Wainwright* that a petition for winding up the company was pending, but they hoped that it would shortly be dismissed. Then everything was ready for completion, the assignment was engrossed, and on the 12th of March I made an order to wind up the company. If there were a valid and subsisting contract when the order to wind up was made, that order could not in any way have interfered with such a contract; and, upon the allegation of the bill, I am bound to assume, as the parties desired to sell, so they had sold, and by their duly authorized agent had signed a contract for sale, which, for the present purpose, I must assume to be binding upon them. Then it is alleged, which is not unimportant, "the contract was in all respects fair and reasonable, and not only was it expressly approved as aforesaid, but the price agreed to be given by the Plaintiff, viz., £2500, was that fixed as the reserve price on the sale by auction." The contract, therefore, according to the allegations of this bill, was deliberately entered into, by which, upon the allegations of the bill, the full and fair price demanded for the property was given by the purchaser, and I cannot say that I think the official liquidator has exercised a sound discretion by in any way entering into litigation upon this subject; and if the matter had been brought before me personally, I certainly should not have allowed him to do so, thereby wasting the assets of the company and wasting the time of the Court. All I can say is, that upon the allegations of the bill, if I had much more doubt than I have, it is not a case in which I should have allowed the demurrer. When a bill is brought for specific performance of a contract as to a thing of so much importance as this is, if there were any doubt as to whether the purchaser can or cannot make out his title to the contract he ought to be allowed to endeavour to do so by going into evidence and amending his bill if he can, and I should do very wrong if I allowed the demurrer, which would at once put an end to the chance of the Plaintiff shewing by evidence his title in this suit. If the Defendants can shew that there has been any want of compliance with the requisitions of the *Companies Act*, or any-

V.-C. M. 1875

BEER v. LONDON AND PARIS HOTEL COMPANY.

thing of that kind, that will be perfectly open to them upon their answer, and upon evidence to be gone into.

Now, it is said that this contract was not signed in such a manner as to bind the company. I think that is answered by referring to the 37th section, sub-sect. 2, of the Act of 1867, which provides: "Any contract which if made between private persons would be by law required to be in writing and signed by the parties to be charged therewith, may be made on behalf of the company in writing, signed by any person acting under the express or implied authority of the company." Supposing this company, while it was a going company, put this property up, as it did, for auction, on the 14th of April last, and supposing the auctioneer signed "for the *London and Paris Hotel Company, Limited*," could it have been gravely argued that, the *London and Paris Hotel Company* having ordered this property to be sold by auction, having employed an auctioneer, who thereby becomes their agent, and who in the usual course of business signs for the *London and Paris Hotel Company*, that would not be a valid contract? It would clearly be so by this section, because it would be made by a person acting under their express or implied authority; and although the authority may not be express, it is an implied authority to the auctioneer to sign the contract on behalf of the vendor, or owner of the property which is sold by auction.

A point has been gone into which I think it is not necessary to give any decision upon. It is not called for by this case; but as the question has been raised before me, I think it right to say that I entertain no doubt whatever, if property, according to usage, is put up to be sold by auction, and, according to usage, the particulars of sale are perfectly silent as to who is the owner or proprietor of the estate, and the property is put up by the auctioneer and sold, and the contract is signed by the auctioneer on behalf of the owner or proprietor, that every such contract is a good contract; and I think it is of the greatest importance that the public should be under no misapprehension whatever as to the validity of contracts entered into under such circumstances. I do not believe that there is one sale in a hundred in which the name of the owner or proprietor is

mentioned in the particulars of sale. It is, "The auctioneers are instructed by the proprietor or owner to offer the property for sale;" and when it has been sold by auction, the auctioneer sells it on behalf of the proprietor, and he may put the name more particularly afterwards. He puts the property up to auction as sold on behalf of the proprietor, and it is sufficient if the proprietor's name is disclosed, in case of a dispute arising between the parties, when a bill is filed for specific performance.

Upon all these grounds I am of opinion that this demurrer must be overruled.

Solicitors for the Bill: Messrs. *Freshfields & Williams.*

Solicitors for the Official Liquidator: Messrs. *Carr, Bannister, Davidson, & Morriss.*

V.-C. B.
1873
Dec. 17, 19, 20.
1875
June 1.

## YARDLEY *v.* HOLLAND.

[1869 Y. 12.]

*Old Will—Devise by Mortgagee of Mortgage and Trust Estates—Subsequent Contract by Testator for Purchase of the Equity of Redemption—Revocation of Devise—Descent—Claim of Heir barred by lapse of Time—Statute of Limitations* (3 & 4 *Will.* 4, *c.* 27), *ss.* 2, 17, 25.

*T. W.*, in 1824, became mortgagee in fee of *Blackacre*. The form of the conveyance was to him on trust to sell, and out of the proceeds to retain the debt, and pay the surplus, if any, to the mortgagor. In February, 1826, *T. W.* made his will, whereby he devised all his real estate (except mortgage and trust estates) and all his personal estate to trustees, upon trust for *Y.* and *H.* He also devised to the same trustees all his mortgage estates upon trust, on payment of the moneys due, to convey the same to the person who should be entitled to the equity of redemption; and directed the moneys to form part of his personal estate. In March, 1826, the mortgagor of *Blackacre* became bankrupt; and in June, 1826, *T. W.* contracted with the assignees in bankruptcy for the purchase of the equity of redemption. The purchase-money was paid by *T. W.*, but no conveyance from the assignees was ever executed. In October, 1826, *T. W.* died, leaving *Y.* and *C.* his co-heirs. *C.* by deed renounced to the trustees of the will all claim under the contract of June, 1826. The trustees under the will entered into receipt of the rents of *Blackacre*, and administered the same as part of the testator's estate until 1869.

*Y.* then claimed the right to a conveyance of one moiety of *Blackacre* as co-heir of *T. W.*:—

*Held*, that the purchase of the equity of redemption by the testator revoked the devise by his will, not only of the beneficial interest but of the legal estate in the mortgaged property; that no dry legal estate in *Blackacre* was remaining in the trustees of the will at the testator's death; that the mortgage estate had by the contract ceased to be a mortgage, and had become a new absolute interest; and that *Blackacre* was undisposed of by the will:

*Held*, further, that the claim of *Y.*, as co-heir, against the trustees had become barred by the *Statute of Limitations*.

MOTION for decree.

By indentures of lease and release, dated the 29th and 30th of March, 1824, a freehold estate called the *Bencliffe* estate, in the parish of *Eccles, Lancashire*, was conveyed by way of mortgage to secure the repayment to *Thomas Watkins*, his executors, administrators, and assigns, of a sum of £9000 and interest. The form of

the conveyance was, to *Thomas Watkins*, his heirs and assigns, upon trust that he, or they, on his or their own proper authority, and without any consent or concurrence of the mortgagor, *David Bentley*, his heirs or assigns, should at any time thereafter sell the estate, and out of the proceeds retain the mortgage debt and pay the surplus, if any, to *David Bentley*, his executors, administrators, or assigns; and *Thomas Watkins* covenanted that he would not sell without giving *Bentley*, his heirs or assigns, six months' notice.

By another indenture, dated the 30th of September, 1824, the same hereditaments were further charged with the repayment to *Thomas Watkins*, his executors, administrators, and assigns, of the sum of £1000 and interest.

In May, 1825, *Thomas Watkins* gave notice to the mortgagor of his intention to sell under the deed; but no sale took place.

*Thomas Watkins*, on the 3rd of February, 1826, made his will, whereby he devised all his lands, tenements, and hereditaments in *Great Britain*, "except mortgage and trust estates," to three trustees (whom he also appointed executors) their heirs, executors, administrators, and assigns, upon trust to sell and dispose of the proceeds as was thereinafter declared of his personal estate. He then gave and devised to the same trustees all and every the hereditaments whatsoever whereof he was seised as mortgagee for any estate of freehold, or in trust for any person or persons whomsoever, and all his estate and interest therein, upon trust, on payment to them of such moneys as should be due in respect of the same premises so in mortgage, to convey the hereditaments of which he was so seised as mortgagee to the use of the several persons who, at the time of making such payment, should be entitled to the equity of redemption in the said mortgaged premises; but he directed that the moneys which should be so received should be applied for the purposes by his will directed concerning his personal estate. After giving various legacies he gave and bequeathed the residue of his personal estate and effects and the moneys to arise from the sales thereinbefore directed to be made of his real estate, to the same three trustees, their executors, administrators, and assigns, upon trust that they should invest, and stand possessed of one-third of the same for the benefit of testator's nephew, *Thomas Watkins Yardley*, for life, and after his death for

V.-C. B. 1873 YARDLEY v. HOLLAND.

his issue as therein mentioned; and should stand possessed of the remaining two-thirds of the same, upon like trusts, for the benefit of his nephews, *John Yardley* and *George Watkins Yardley*, for their respective lives, and after their respective deaths, for their issue respectively; and if either of the three nephews should die, not having had a child who should attain twenty-one, or die under that age leaving issue, the part or share of such nephew was to fall into the residue of the personal estate.

In March, 1826, *David Bentley* with his then partner, *James Fogg*, became bankrupt; and by a memorandum or agreement in writing, dated the 6th of June, 1826, the parties thereto of the first part, being the assignees in bankruptcy, claiming to be entitled to the equity of redemption in the *Bencliffe* estate, for their heirs, executors, and administrators, agreed with *Thomas Watkins*, his heirs, executors, administrators, and assigns, that they, their heirs, executors, and administrators, would at any time thereafter, at the request and costs of *Thomas Watkins*, his heirs or assigns, release to him, his heirs or assigns, all the right or equity of redemption, if any, which they, or such assignees as aforesaid, had or claimed to have in the *Bencliffe* estate; and in consideration thereof *Thomas Watkins* thereby undertook to pay to the parties of the first part the sum of £200 as the purchase-money of the said equity of redemption.

The sum of £200 was paid by the testator, who between May and August, 1826, entered into possession of the *Bencliffe* estate, all but the mansion house and grounds; and continued in such possession until his death.

No legal conveyance of the equity of redemption was ever made by the assignees in bankruptcy to *Thomas Watkins*, his heirs or assigns; and it did not appear that any conveyance by enrolled bargain and sale was ever made by the Commissioners in Bankruptcy to the assignees, as required by the 6 Geo. 4, c. 16, the statute then in force.

On the 4th of October, 1826, *Thomas Watkins*, the testator, died, leaving his sister *Sarah Court*, widow, and his nephew *Thomas Watkins Yardley*, his co-heirs at law.

After the testator's death, the trustees of the will paid a further sum of £315 to *David Bentley*, who, it appeared from the evidence,

had until then retained possession of the mansion in satisfaction of some demand which he made, as he stated, "for my services and expenses at *Bencliffe* and *Manchester*," and who thereupon gave up the entire possession to the trustees, and it was not disputed that ever since May, 1827, the trustees of the will had continued in uninterrupted possession of the *Bencliffe* estate, and that they had dealt with and administered the rents and profits of it according to the trusts of the will.

By an indenture dated the 31st of December, 1827, and expressed to be made between *Sarah Court*, described as "only sister and heiress-at-law" of *Thomas Watkins*, of the one part, and the then trustees of the will of the other part, after reciting the above mortgage and further charge, the will, the agreement for purchase, and the death of the testator, that no conveyance of the equity of redemption had been made, "nor has the said agreement in any manner been carried into effect so far as regards the equity of redemption of and in the same several hereditaments and premises," and that "doubts and difficulties have arisen respecting the title of" the assignees "to the said equity of redemption . . . and as to their right to make and enter into" the agreement of the 6th of June, 1826, and that "doubts have also arisen as to the effect of the same agreement with respect to the estate and effects of the said *Thomas Watkins* deceased," and that, in order to remove and do away with such doubts and difficulties, and to obviate the necessity of a suit which the trustees were about to commence against the assignees, it had been agreed "that the same agreement shall be rescinded and entirely done away with as fully and effectually as if the same had never been made or entered into," it was witnessed that in pursuance and performance of the then present agreement, and in consideration of £200 paid by the trustees to *Sarah Court*, she thereby testified and declared that the agreement of the 6th of June, 1826, should, so far as the same related to her, her heirs, executors, or administrators, be rescinded and thenceforth rendered null and void to all intents and purposes, and she thereby constituted the trustees her attorneys to execute all deeds and other acts necessary for rescinding the same.

In July, 1832, *George Watkins Yardley*, one of the testator's

V.-C. B. 1873 YARDLEY v. HOLLAND.

nephews, died without issue, and upon that event the shares of the two other nephews, *Thomas Watkins Yardley* and *John Yardley*, and their respective issue, in the residuary estate, became moieties instead of thirds.

On the 12th of December, 1834, Mrs. *Court* died.

On the 9th of December, 1840, *Thomas Watkins Yardley* died, intestate as to real estate, other than mortgage and trust estates, leaving as his only issue one daughter, his heiress-at-law, *Ann Watkins Yardley*, who in October, 1863, married *William Holland*. Previous to her marriage a settlement was executed, by which all her estate and interest under the will of *Thomas Watkins* were assigned to *William Allen*, *Richard Leigh Holland*, and *Frederick Richard Marshall*, as trustees.

In April, 1867, *John Yardley*, the other nephew of the testator died, leaving five infant children.

On the 24th of August, 1869, the original bill was filed by the infant children of *John Yardley*, against Mr. and Mrs. *Holland* and their trustees, *Allen*, *Holland*, and *Marshall*, and the then trustees of the testator's will, praying for administration.

The answer of the trustees of Mr. and Mrs. *Holland's* settlement, filed in January, 1870, stated that they were in April, 1869, advised to institute inquiries, which resulted in their discovering that the *Bencliffe* estate was an estate on which the testator had at the date of his will a mortgage only.

On the 9th of September, 1871, the Defendant, *Ann Watkins Holland*, died.

On the 28th of October, 1871, the Defendants, *William Holland* and the trustees of his marriage settlement, filed another (voluntary) answer, in which they submitted that by reason of the purchase in June, 1826, by the testator of the equity of redemption, although there was no conveyance, there was no mortgage existing at the death of the testator, and that the equitable title, and the right to call for the legal title of the *Bencliffe* estate descended to his co-heirs-at-law. On this ground the trustees of the settlement claimed one moiety of the estate.

They also submitted that the deed of the 31st of December, 1827, operated as a relinquishment by *Sarah Court* to the trustees, in favour of the beneficiaries under the will, of her moiety in the

estate; and that the title of the beneficiaries had become absolute by lapse of time against *Sarah Court* and her heirs. On this ground the trustees of the settlement claimed one moiety of the other moiety of the estate.

On the 22nd of February, 1872, the bill was finally re-amended, and as thus re-amended was filed by the same Plaintiffs against *William Holland*, his children and his settlement trustees, the present trustees of the will, and the present personal representatives of the testator, stating that difficulties had arisen and were pending with regard to the testator's unsold real estate, and in particular with regard to the *Bencliffe* estate, as to which claims, adverse to the title under the will, had been set up by the first Defendants; but which claims, if they ever had any foundation (which the Plaintiffs did not admit), were barred by the possession for upwards of forty years of the trustees of the will, and by the *Statute of Limitations;* and praying for administration so far as the trusts remained to be performed, and that the rights and interests of all parties in the unsold real estate, including the *Bencliffe* estate, might be ascertained and declared.

1873. Dec. 17. Mr. *Kay*, Q.C., and Mr. *Townsend*, for the Plaintiffs:—

From the year 1826 until 1869, when this claim by the Defendants was first made, this property has always been treated as real estate. If it was not real estate, if it was merely property on which the testator advanced money, and got a conveyance to himself as mortgagee, it would then pass as part of his residue. If, on the other hand, it became real estate after the date of the will by reason of his having purchased the equity of redemption, we then say that the right of the heir-at-law has been barred by the statute. How can it be said that the trustees of the will were trustees for the heir? They were trustees only for the mortgagor. From the accounts it appears that this property has always been treated as if it had passed by the will.

By sect. 2 of the *Statute of Limitations* (3 & 4 Will. 4, c. 27), no land can be recovered but within twenty years after the right of action has accrued; and forty years is by sect. 17 an absolute bar.

V.-C. B. 1873 YARDLEY v. HOLLAND.

If the devisees of the will were trustees for the heir, at least they were only constructive, not express, trustees; and sect. 25 is excluded. Under the 27th section acquiescence for forty years is a bar against an heir setting up a case even of constructive trust. In this instance the heirs might have claimed the legal estate at the testator's death. The only express trust was to convey to the persons who were entitled to the equity of redemption. At the testator's death no one was entitled to redeem.

Another view is, that the testator himself by this purchase extinguished his equity of redemption, and converted his equitable interest into absolute ownership. He became seised absolutely. The only way by which anything could have passed was by the devise of mortgage and trust estates. But, in truth, nothing passed by that devise. By the purchase of the equity of redemption, the devise of this estate as a mortgage or trust estate was revoked. The purchase of the equity operated as a new purchase of the land: *Brydges* v. *Duchess of Chandos* (1); *Rawlins* v. *Burgis* (2); *Casborne* v. *Scarfe* (3); *Strode* v. *Lady Falkland* (4).

Assuming then, as we contend, that nothing with regard to this estate passed by the will, it descended; and as the trustees entered in 1826 and 1827, it is the idlest thing to argue that the right of the heir is not barred. Even if the legal estate under the mortgage deed did pass to the trustees, they held that legal estate as part of the testator's general estate against everybody claiming against the will: *Burroughs* v. *M'Creight* (5). Their possession would be adverse to the co-heirs.

Rightly or wrongly, the trustees did, as a fact, treat this as part of the general estate. If their possession was wrongful, it was as adverse to the co-heirs as could be conceived.

An express trust can only arise when it appears on the face of the instrument; not merely the dry legal estate, but the beneficial interest, must appear: *Salter* v. *Cavanagh* (6); *Commissioners of Charitable Donations* v. *Wybrants* (7).

Suppose the testator had expressly devised the equity of re-

(1) 2 Ves. 417.
(2) 2 V. & B. 382.
(3) 1 Atk. 603; 2 Jac. & W. 194.
(4) 2 Vern. 621; 3 Rep. in Ch. 90.
(5) 1 J. & Lat. 290.
(6) 1 D. & Wal. 668, 681.
(7) 2 J. & Lat. 182, 196.

demption, could there then have been any doubt that the devisee would by this time have been barred?

That a deed in this form is a mortgage within the 28th section, and that even an express trust will be barred if no surplus seems probable, appears from *Locking* v. *Parker* (1).

Mr. *Eddis*, Q.C., and Mr. *Bevir*, for the Defendants, the present trustees of the will.

Mr. *Amphlett*, Q.C., and Mr. *William Pearson*, for the first Defendants, Mr. *Holland*, his children, and the trustees of his marriage settlement:—

We claim one moiety of this estate, not under the will, but as heir-at-law of the testator, and we ask, not for a sale, but for a conveyance of this moiety to us.

Further, we say, if any interest in this estate passed by the will, as, for example, Mrs. *Court's* moiety, to one moiety of that interest we are also entitled.

We do not dispute the validity of the agreement for purchase of the equity of redemption. But we say, when the will was made, the testator was mortgagee in fee; he devised this mortgaged estate upon ordinary trusts, and if nothing more had happened the mortgage-money when realized would have been disposed of according to the general purposes of the will. Then came the agreement for purchase of the equity of redemption. To pass that right no deed was necessary. So far we are agreed. It must be admitted further, that if the equity of redemption had been foreclosed, or had been conveyed by deed, it would have been extinguished, and a perfectly new estate would have been created, which would not have passed by the will.

But here there was no conveyance, only a contract, a thing which a Court of Law will not look at. Hence there was nothing which operated at law to revoke the devise. All a Court of Law would find would be a devise of this mortgage estate to trustees. Suppose after a devise of real estate there had come a contract to sell the estate. That would not affect the devise: *Jarman* on

(1) Law Rep. 8 Ch. 30.

V.-C. B. 1873 YARDLEY v. HOLLAND.

Wills (1). It follows that the devisee of this mortgage estate became a trustee for the heir: *Brydges* v. *Duchess of Chandos* (2); *Rawlins* v. *Burgis* (3). *Casborne* v. *Scarfe* (4) involved a legal right, viz., the husband's curtesy: *Strode* v. *Lady Falkland* (5); *Coote* on Mortgages (6); *Thompson* v. *Grant* (7).

But, further, could the agreement with the assignees of the 6th of June, 1826, have been specifically performed? We say it could. The absence of a conveyance by enrolled deed of bargain and sale, which by 6 Geo. 4, c. 16, s. 64, is ordered to be made by the Commissioners to the assignees, would not in this Court have been an obstacle: *Lloyd* v. *Lander* (8).

At the testator's death, therefore, the trustees were seised of a legal estate upon the trusts of the will; under the will there was a devise to these same persons upon the same trusts; which trusts becoming inoperative, there is a resulting trust for the heir-at-law.

As to the express trust, no doubt, if the words of the 25th section be taken as the Plaintiffs would read them, we might be held to have been barred. But the case is covered by authority. It is sufficient that on the face of the instrument a trust does appear—that the devisees do not take beneficially. No matter that the declared trust fails, and that an implied trust arises; if a trust appears at all, it is an express trust within the section: *Salter* v. *Cavanagh* (9); *Commissioners of Charitable Donations* v. *Wybrants* (10); *Sugden* on Real Property Statutes (11).

If the devise of mortgage estates had been to a different set of trustees, then, no doubt, the Defendants would have been in under a wrongful title. But it is abundantly clear that if there are two titles, and the trustee enters, he will be held to have entered under the right title: *Lister* v. *Pickford* (12). We have been in receipt of one moiety of the rents, and therefore to that extent in possession; the trustees cannot now say they paid us by mistake. Claiming *dehors* the will, we have a right to attribute these payments to our rights *dehors* the will.

(1) 3rd Ed. p. 67.
(2) 2 Ves. 417.
(3) 2 V. & B. 382.
(4) 1 Atk. 603; 2 Jac. & W. 194.
(5) 2 Vern. 621.
(6) Pages 550, 551.
(7) 4 Madd. 438.
(8) 5 Madd. 282.
(9) 1 D. & Wal. 668.
(10) 2 J. & Lat. 182.
(11) Page. 103.
(12) 34 Beav. 576.

No case of election arises here.

An argument has been advanced about acquiescence; but there cannot be acquiescence without notice, and this they have not proved: *Mills* v. *Druitt* (1).

Mr. *Bury*, for the Defendants, the testator's personal representatives.

Mr. *Kay*, in reply, referred to *Ex parte Morgan* (2).

In the course of the reply, reference was made by the Plaintiffs' counsel to a deed of release dated in 1863, the year only being stated, which was produced in Court by the Plaintiffs, but not put in evidence, and which purported to be a release from *Ann Watkins Yardley* (afterwards Mrs. *Holland*) to the then trustees of the will. On the first Defendants' counsel expressing surprise, the further hearing was ordered to stand till the 11th of January, 1874, and was afterwards postponed from time to time to allow of the attendance of a witness named *Francis Robinson Hood*, who was suffering from illness. The witness, however, died on the 25th of March, 1875, and the cause now came on again, when His Honour read the following judgment.

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1875. June 1. SIR JAMES BACON, V.C.:—

The Plaintiffs in this suit, claiming to be interested in a moiety of the real and personal estate of *Thomas Watkins*, long since deceased, pray, by their bill, that the trusts of the testator's will, so far as the same remain to be performed, may be carried into execution, and the estate administered under the direction of the Court. The Defendants are principally the persons who are interested in the other moiety of the same estate; the other Defendants on the record being trustees, and persons who are parties in a merely representative capacity, having no beneficial interest in the subject. But for the contention raised by the defendants first referred to, the case would have been one of the

(1) 20 Beav. 632. (2) 10 Ves. 101.

V.-C. B. 1875 YARDLEY v. HOLLAND.

most ordinary kind, and would have constituted a simple administration suit. No facts are disputed, no circumstances have occurred which can occasion difficulties or give rise to doubts. The claim, however, which is preferred by the principal Defendants is of a very serious character, inasmuch as, if it should prevail, it would give to these Defendants an entire moiety of an estate of considerable value, and, as they insist, a half of the other moiety of the same estate. This claim has been argued and insisted upon at great length and with great earnestness, and it depends mainly upon the effect of the *Statute of Limitations* (3 & 4 Will. 4, c. 27). In order to arrive at a decision upon the points argued, it is necessary to consider briefly the facts out of which they arise.

[His Honour stated the case as it appears above, and continued:—]

Upon this state of facts it is that the Defendants, *William Holland*, his four infant children, and the trustees of his marriage settlement, insist upon the purchase made by the testator, after the date of his will, of the equity of redemption from *Bentley's* assignees, and contend that there was consequently no mortgage existing at the testator's death, and that the equitable title, and the right to call for the legal title, of and in the *Bencliffe* estate descended on his death to his co-heirs-at-law, *Sarah Court* and *Thomas Watkins Yardley;* and that one moiety of that estate now belongs to the trustees of Mrs. *Holland's* marriage settlement, the testator having died intestate as to subsequently-acquired real estate other than mortgage and trust estates.

The Plaintiffs and the trustees of the will do not dispute that the true effect of the purchase by the testator of the equity of redemption was to vest in him the whole legal estate, and all beneficial interest in the mortgage, freed and discharged from the trusts expressed in the mortgage deeds; that, consequently, at the time of his death, there was nothing upon which the devise of all his mortgage and trust estates could operate; that the purchase by him after the date of his will was the acquisition of a new and different estate and interest from that which he had purported by his will to devise to them; and they agree with the Defendants that the testator was not at the time of his death seised of or entitled to any mortgage or trust estate; nor do they

dispute that the *Bencliffe* estate, the absolute right and title to which the testator had thus acquired, descended upon his death to his heirs-at-law; and, indeed, the law upon this subject is too well and firmly established to be open to question or doubt.

In *Strode* v. *Lady Falkland* (1) the decision is expressed in the plainest terms: "And when the equity of redemption was afterwards purchased in, 'twas then as a new acquisition—a new purchase in fee—and did not pass by the will made before." And the Lord Chancellor said: "As to the mortgages, though the equity of redemption be afterwards bought in or foreclosed, yet they cannot pass that, being a revocation *pro tanto*." And although several cases were referred to in the course of the argument, and others may be found referring more or less pointedly to the subject, in none of them can be found anything at variance with this statement of the law as it stood at the date of the will.

The Defendants have, however, suggested that, though this be so, yet that what they call a "dry legal estate," although without beneficial interest of any kind, passed by the devise to the trustees, and that of that dry legal estate the trustees are seised in trust for the heirs. For this argument I am of opinion that there is no foundation. It is not only inconsistent with their contention—plain in its terms and true in law—that the testator died intestate as to the estate in question, but it would contradict the very words of the will. The estate, which had been a mortgaged estate, held upon trusts by the testator, had before his death ceased to be a mortgaged estate—there were no trusts to be performed by him or by any one who should succeed him—and the will is, in the respect I have been examining, wholly inoperative and ineffectual, and can only be read for the purpose of construction, as if no devise of mortgaged or trust estate had been mentioned in it.

The case of the Plaintiffs, therefore, is, that, having regard to the possession of the *Bencliffe* estate by the trustees of the will from 1826, the statute 3 & 4 Will. 4, c. 27, is an effectual answer to the claim made by the Defendants for the first time, by their voluntary answer filed on the 28th of October, 1871; and upon this single point the decision of the case must rest. The Defen-

(1) 3 Rep. in Ch. 90.

V.-C. B. 1875 YARDLEY v. HOLLAND.

dants have argued that the statute does not affect their claim, for that the 25th section of the statute prevents the lapse of time from barring them by reason of the estate being held by the trustees upon "express trust," and they rely upon the case of *Salter* v. *Cavanagh* (1), in which a testator gave lands producing a clear profit rental of £60 to trustees, upon trust to pay annuities for life, the aggregate amount of which was less than the whole amount of the rental; but declared no trust of the surplus. The decision there was, that there was declared an express trust upon the face of the will within the meaning of the 25th section of the *Statute of Limitations;* and that the heir of the testator was not barred by lapse of time from claiming that which was not actually given to some other person. That case was cited before Lord *St. Leonards* in *Commissioners of Charitable Donations* v. *Wybrants* (2), when he declined to give any opinion upon the point whether the "express trust" mentioned in the statute must appear upon the face of the instrument, but decided that the estate having been devised subject to a charge, the devisee, being liable to the burthen, was impressed with the character of a trustee for the charity entitled to the charge; and that, therefore, under the 25th section of the statute, the lapse of time formed no bar to the claim of the charity.

No doubt the will in this case does contain express trusts—but of what? So far as the question in dispute arises, they are only trusts of the mortgaged and trust estates belonging to the testator at the date of his will. If the *Bencliffe* estate remained at the testator's death a trust estate or a mortgaged estate, all the testator's interest in it passed by the will. But the Defendants have insisted—and their contention in this respect is supported by the authorities referred to—that, by the manner in which the testator dealt with that estate, he had acquired the absolute and exclusive right to it—he had extinguished the equity of redemption, and wholly annihilated all trusts which once affected it, and had become absolutely seised of an estate different from that which he had disposed of by his will, and of which they say he died intestate. That the devisees in trust thought the estate passed to them upon the trusts of the will is clear, but it is not

(1) 1 D. & Wal. 668. (2) 2 J. & Lat. 182.

upon this ground that they can defeat the Defendants' claim. And, when the Defendants have succeeded in this contention, that nothing in the *Bencliffe* estate passed by the will, they destroy at once all notion that there could remain any trusts to be performed by the trustees.

The contention of the Defendants that there remains in the trustees a dry legal estate of which they, the Defendants, are entitled to a conveyance, is not only wholly inconsistent with their argument that nothing passed by the will, but it is opposed to the plain principles of the law, and equally repugnant to common sense. If the estate passed at all to the trustees, the trusts passed along with it, and are inseparable from it, and the trustees cannot be called upon to convey an estate which they hold upon express trusts for the very purpose of destroying those trusts. But, in truth, this notion of the dry legal estate is wholly visionary and fictitious; it is so dry as to be wholly impalpable, and cannot be said to exist even as a metaphysical entity.

A point was made, in the course of the discussion, of the fact that, in December, 1827, the trustees of the will had procured the assent of *Sarah Court*, one of the heirs of the testator, to their rescinding the agreement which the testator had entered into with the assignees of *Bentley* and *Fogg* for the purchase of the equity of redemption in the *Bencliffe* estate, and had paid her £200 as the consideration for such her assent.

No explanation is given of this transaction, and at this distance of time it is not probable that any explanation can be given. Nothing, however, seems to have been done in consequence of it. No claim has been, or can be made by the assignees, and the suggestion of the Defendants that they have by virtue of this agreement become entitled, under the will, to a moiety of that moiety of the estate which upon the testator's death descended upon *Sarah Court* as one of his heirs, is wholly unsustainable.

Now, in this state of things, the case presents at least a remarkable appearance. For nearly half a century the administration of the trusts of the testator's will has proceeded without question. The trustees have been in undisputed possession of the *Bencliffe* estate, and all the rest of the testator's estate, and have held those estates adversely to all the world except their own *cestuis que trust*,

V.-C. B. 1875 YARDLEY v. HOLLAND.

and have duly administered them according to the trusts of the will. The testator's co-heirs, *Thomas Watkins Yardley* and *John Yardley*, who were tenants for life, enjoyed their respective interests without difficulty or question. *Thomas W. Yardley's* only child, the late Mrs. *Holland*, settled her share upon her husband and her children. During her life, she enjoyed the interest purported by the will to be given to her, and subsequently to her death, her husband and her children, the Defendants, have enjoyed and do enjoy the like interest.

The children of *John Yardley* are and have been in the like enjoyment; and it is under these circumstances, and at this distance of time, that the claim of the Defendants last named is set up.

The answer of the trustees of the will, and the answer of the infant Plaintiffs to this claim is, that the undisputed possession of the estate by the trustees since the year 1826 is made by the statute a perfect and complete bar to so stale and unreasonable a demand as that which is now preferred against them. There may, indeed, be cases in which that protection which the statute extends is hardly reconcilable with strict morality. Nevertheless, the law is established upon principles of the soundest public policy, to which, for the common good, private rights and interests must in all cases yield; and it is unquestionably the policy of the law that it is better in all cases that rights, the assertion of which has been neglected for a long period of years, should be disregarded, than that a course of transactions honestly conducted should be set at nought by permitting a captious chicanery to prevail against the good faith with which they have been conducted.

And of all the cases which can be conceived, it would hardly be possible to find one in which the principles and the policy of the law are more clearly vindicated than that which is the subject of the present litigation. For to admit the claim which the Defendants now set up would be, not only to disregard those principles and to counteract that policy, but it would be to give an encouragement and support to an unjust attempt to make the form of the law take the place of that justice which it is the first purpose of the law to establish.

I think it was in an evil moment, and under a total mistake of

the law, that this contention was raised. Much time and expense have been wasted in the discussion of a claim by the Defendants, the *cestuis que trust* under Mrs. *Holland's* settlement, which is wholly without foundation, and which has had no other effect than to create a dispute between parties whose interests are equal, and between whom nothing but a perverse ingenuity could have raised the shadow of a question.

The decree will contain a declaration that the Plaintiffs, and the Defendants entitled under the late Mrs. *Holland's* settlement, are entitled, in equal moieties, and according to their respective interests, to the whole of the trust estate, the particulars of which, including the *Bencliffe* estate, will be ascertained. None of the parties desiring that the accounts of the trust estate should be taken, it will be unnecessary to give any directions on that subject. The general costs of the suit must of necessity be borne by the trust estate; but, in ascertaining the amount of those costs, the Taxing Master will disallow to the Defendants, *William Holland* and the trustees of his marriage settlement, all such costs as have been occasioned by the claim preferred by them in respect of the *Bencliffe* estate, and in respect of the moiety supposed to have belonged to *Sarah Court*, and to have been relinquished by her in favour of the persons interested in the testator's personal estate.

Solicitors for the Plaintiffs and non-opposing Defendants: Messrs. *Milne, Riddle, & Mellor*, agents for Messrs. *Cunliffe, Leaf, & Co., Manchester.*

Solicitors for the opposing Defendants: Messrs. *Sharpe & Ullithorne*, agents for Mr. *G. Birch, Lichfield.*

V.-C. B.
1875
June 3.

## SALAMAN *v.* GLOVER.

[1875 S. 127.]

*Light and Air—Lessor and Lessee—Collateral Agreement—Lease controlled by.*

An agreement to grant *A.* a lease, in a form set out in a schedule, of property in the City as soon as the house then in course of erection by *A.* on the property should be completed, contained a proviso that nothing therein contained should give *A.* a right to any easement which did not belong to the premises agreed to be demised as they then existed, nor to any right of light and air derived from over the houses opposite (which belonged to the lessors). The lease subsequently granted was of the land together with the house erected thereon, and all lights, easements, and appurtenances thereto belonging, in accordance with the scheduled form:—

*Held*, that the grant by the lease of lights and easements was controlled by the antecedent agreement, which was to be read as part of the lease; and that *A.* was not entitled to restrain the lessees of the opposite houses from building so as to obstruct the access of light and air to his premises from over such houses.

In 1869 the Plaintiff *Salaman*, having acquired the residue of a lease granted by the *Goldsmiths' Company* of a house in *Maidenhead Court*, in the city of *London*, surrendered this lease and applied to the company for a building lease of the ground occupied by Nos. 1, 2, 3, 4, *Maidenhead Court* (having a frontage towards *Maidenhead Court* and *Redcross Square*).

On behalf of the company, Mr. *Hesketh*, their architect, by an agreement of the 17th of June, 1869, agreed that as soon as the house to be erected by the Plaintiffs should be covered in the company would demise by indenture to the Plaintiffs the land in question for a term of sixty years—the lease to be in the form annexed to the agreement. And it was provided in the agreement "that nothing herein contained shall be construed as giving to the said *Meyer Salaman* a right to any easement which does not belong or appertain to the premises hereby agreed to be demised as they now exist, nor to any right of light and air derived from over the houses on the east side of *Redcross Square* and the south side of *Maidenhead Court* aforesaid, nor any power or authority to block or obstruct any easement which belongs to any other property of the said Wardens and Commonalty, or of any other person or persons whatsoever."

The Plaintiffs proceeded to pull down the houses 1, 2, 3, 4, *Maidenhead Court*, and built a new messuage upon their site. After the completion of the new messuage, the *Goldsmiths' Company*, by an indenture of the 24th of November, 1870, granted to the Plaintiffs a lease of the land on which the new messuage had been erected, "together with the messuage or dwelling-house and premises erected and built thereon, and all cellars, lights, easements, ways, watercourses, privileges, advantages, and appurtenances to the said premises belonging," being in the form annexed to the agreement.

In December, 1874, Mr. *Hesketh*, on behalf of the *Goldsmiths' Company*, entered into an agreement with the Defendants to grant, for building purposes, a lease of land fronting *Maidenhead Court*, immediately opposite the land demised to the Plaintiffs.

The Defendants had pulled down the old buildings, about twenty feet high, thereon, and commenced the erection of a new building, which was intended to be of a height much greater than that of the former buildings.

*Maidenhead Court* is only from 5 ft. 6 in. to 6 ft. 2 in. wide, and the effect of the Defendants' new building, if carried up to the height proposed (sixty feet), would be, as alleged by the Plaintiffs, completely to darken and render useless for the purposes for which it was now employed the Plaintiffs' warehouse or messuage. They had accordingly filed their bill, and now moved for an injunction to restrain the interference by Defendants with the access of light and air to the windows of their warehouse.

Mr. *Kay*, Q.C., and Mr. *J. M. Solomon*, for the Plaintiffs, in support of the motion:—

We rely upon our lease of the 24th of November, 1870, by which the site of our warehouse, with all lights, easements, and appurtenances, was demised to us by the *Goldsmiths' Company*. After this demise the company cannot build upon the remainder of their land so as to stop the lights of the house upon the land demised to us for building purposes; and as the company cannot do it, so neither can their vendee or lessee: *Palmer* v. *Fletcher* (1); *Gale* on Easements (2). The erection of the Defendants' building so

(1) 1 Lev. 122. (2) Page 88.

V.-C. B. 1875 SALAMAN v. GLOVER.

as to darken our windows is an act whereby we have sustained a derogation of rights acquired by our lease, and the antecedent agreement of 1869 cannot be looked at for the purpose of construing or contradicting the plain terms of our lease—*i.e.*, to light unobstructed by anything to be erected on any land which at the time belonged to the grantor; and as the original lessors could not have derogated from their grant, all lessees claiming under them are equally bound: *Compton* v. *Richards* (1); *Leech* v. *Schweder* (2).

Mr. *Jackson*, Q.C., and Mr. *Davey*, for the Defendants:—

It may be admitted that if the lease stood alone it would not be competent for the *Goldsmiths' Company* to build so as to obstruct the light granted to the Plaintiffs; and further, that the case must be tried as if the *Goldsmiths' Company*, and not their lessees, were the Defendants.

But the grant contained in the lease is cut down by the proviso in the antecedent agreement, which is a binding collateral agreement affecting the enjoyment of the land demised, capable of being enforced independently of the lease, although not incorporated in it: *Moryan* v. *Griffith* (3); *Erskine* v. *Adeane* (4).

The company intended at the time to grant a building lease of the opposite site, and would not have granted a lease to the Plaintiffs except upon the collateral understanding that the legal right to an uninterrupted access of light and air was to be excluded. Having thus contracted themselves out of their right to complain of any obstruction to their easement of light and air in a particular direction, the Plaintiffs are not entitled to an injunction. So far as their case is rested upon a title by prescription, independently of the grant contained in their lease, the answer is that a tenant cannot prescribe against his own landlord, or any one claiming under him.

[They referred to *Leech* v. *Schweder* upon this point.]

Mr. *Kay*, in reply:—

The whole fallacy lies in calling the agreement of 1869 a collateral agreement. To be collateral, it must in no way con-

(1) 1 Price, 27.
(2) Law Rep. 9 Ch. 463.
(3) Law Rep. 6 Ex. 70.
(4) Ibid. 8 Ch. 756.

tradict, and must not contain any terms "which conflict with the written document": *Morgan* v. *Griffith* (1).

The agreement on which the Defendants rely is inconsistent with and directly contradicts the terms of the lease, by restricting that which was unrestricted, and to admit it as controlling the terms of the lease would be against every rule of evidence and construction, and beyond the authorities of *Morgan* v. *Griffith* or *Erskine* v. *Adeane* (2), where the stipulation relied on was not a parol variation of the lease, but a collateral promise made as a consideration for the execution of the lease. But if the antecedent agreement can be looked at, it was merely an interim provision, operating only until the house was built and the formal lease granted.

SIR JAMES BACON, V.C.:—

I cannot think there is any such right as has been asserted on the part of the Plaintiff. Whether the agreement is collateral or not is a matter of very slight importance. It is to be construed by the Court for the purpose of deciding the rights of the parties. The history of the agreement is clear upon the evidence, and without evidence would almost tell its own story. The *Goldsmiths' Company*, having land which they were about to let for building purposes, agreed to let it to the Plaintiff, and in order that he who was going to lay out his money might have some sort of security, this agreement was entered into, upon which he was put into possession and at liberty to commence his building operations. He was to have a lease, but not until a certain progress should have been made in the building, and the lease was to be made "in the form hereto annexed." Then comes the proviso. How, then, is the proviso contained in an agreement—that he shall have a lease in the form hereto annexed with a proviso—to be dealt with? Is it not the right of the lessor, the lease being executed in the terms there prescribed, to come to the Court and say, "Insert in the lease that proviso which was part of the original contract"? Can I read the lease as meaning anything else but being governed by that proviso? I think not in point of law. In point of reason and justice I have not a shadow of doubt about it; but in point of law I think the *Goldsmiths' Company* have a right to say that the

(1) Law Rep. 6 Ex. 70. (2) Law Rep. 8 Ch. 756.

V.-C. B. 1875 SALAMAN v. GLOVER.

agreement speaks for itself. There is a lease which is in proper terms, and demises the easements, and the light, and all the other things included in those general words; but inasmuch as other operations are going on there which make it necessary to qualify the generality of that demise, it is provided that "nothing herein contained"—and although stress was laid on that expression "herein contained," I must read the prescribed form of lease as being contained in the schedule to it—"shall be construed as giving to Mr. *Salaman* a right to any easement which does not belong or appertain to the premises hereby agreed to be demised as they now exist, nor to any right of light and air derived from over the houses on the east side of *Redcross Square* and the south side of *Maidenhead Court* aforesaid, nor any power or authority to block or obstruct any easement which belongs to any other property of the said company, or any other person or persons whomsoever." I must read these words for all purposes of construction to decide legal rights as if they were inserted in the lease which has been executed, and in my opinion the Plaintiff is bound by that proviso. He is bound not to claim light and air for the houses on the south side of *Maidenhead Court.* He is bound by every other restriction which is there contained, and the words "lights and easements" are to be read with that qualification. There must be other lights, there may be other easements; what there must be or may be I do not know, nor need I now inquire. But the words contained in the demise have their full potency and effect subject to the proviso, which, in my opinion, is so clear that no doubt whatever can be entertained about the intention of the parties, or the legal effect of the documents which have been executed.

Motion refused with costs.

Solicitors: Messrs. *Hilleary;* Mr. *J. P. Biggenden.*

## PADDON *v.* WINCH.

V.-C. B.
1875
June 10.

[1869 P. 178.]

*Practice—Taxation—Lower Scale—Gen. Ord. 30th Jan. 1857, r. 3—Suit to enforce Charge.*

The costs of a suit by a legatee to enforce against the testator's real estate in the hands of a purchaser his legacy charged by the will on such real estate, are taxable on the lower scale under Rule 3 of the Order of the 30th of January, 1857, when the amount of such charge is less than £1000.

APPLICATION by adjourned summons for an order that the Taxing Master might review his taxation, by which the costs of the Plaintiff and of Defendants in the same interest were taxed on the higher scale.

The bill was filed by a legatee for the purpose of having the amount found due for principal and interest in respect of three several legacies of £150, £250, and £250, given to the Plaintiff and the Defendants *Betsey Ching* and *John Hopper* by the will of *William Turner*, and thereby charged upon his freehold messuages and tenements, declared to be a charge upon such freehold property in the hands of the Defendant *Winch*, to whom (with an indemnity against the legacies) the property had been sold by the mortgagees. The bill also prayed an account of what was due to the Plaintiff and the other two legatees for principal and interest in respect of their legacies, and payment by the Defendant *Winch* by a short day, together with the costs of the Plaintiff and the Defendants *Ching* and *Hopper*, or in default of payment, a sale; and if necessary, the appointment of a receiver.

By the decree made on the 2nd of June, 1874 (in addition to payment of the sums found due in respect of the three legacies amounting in all to £709 19*s.* 10*d.*), the Defendant *Winch* was ordered to pay to the Plaintiff and to the Defendants Mrs. *Ching* and *John Hopper* the amount of their costs of suit when taxed.

The Taxing Master had taxed the costs on the higher scale, and in reply to objections taken by the Defendant *Winch* had stated his reasons as follows:—

V.-C. B. 1875. PADDON v. WINCH.

"I have taxed the costs, &c., on the higher scale because I consider that the subject-matter of this suit falls within the express words of the first case as to scale at page 195 of the Cons. Orders, the real estate of the testator charged with the legacies being above £1000."

A summons was taken out by the Defendant for a review of the taxation, and adjourned into Court (1).

Mr. *Ince*, in support of the summons:—

This being a suit to enforce a charge, viz., a legacy charged upon land, and the charge being for an amount less than £1000, the case falls precisely within the 3rd rule. That rule is not confined to mortgages properly so called, either equitable or legal, as in all such cases the only proper remedy is foreclosure or redemption: *James* v. *James* (2); and consequently if any meaning is to be given to the words that follow, "or for enforcing any charge or lien," they must refer to charges which are not charges by way of mortgage, and they are properly applicable to a case like the present, where nothing in the shape of administration is prayed, and the suit is simply to obtain the benefit of a charge upon freehold hereditaments.

Mr. *E. Cutler*, for the Plaintiff, in support of the Taxing Master's

(1) The regulation as to solicitors' fees and charges contained in the Order of the 30th of January, 1857 (see *Morgan*, 4th Ed. App. xxxiii.), is, so far as is material, as follows:—

"1. Solicitors shall be entitled to charge and be allowed the fees set forth in the column headed 'Lower Scale' in the 2nd schedule hereto in the several cases following, unless the Court shall make order to the contrary; that is to say,

"1st. In all suits by creditors, legatees (whether specific, pecuniary, or residuary), devisees (whether in trust or otherwise), heirs-at-law, or next of kin, in which the personal or real or personal and real estate for or against or in respect of which, or for an account or administration of which, the demand may be made, shall be under the amount or value of £1000.

"2ndly. In all suits for the execution of trusts in which the trust estate or fund shall be under the amount or value of £1000.

"3rdly. In all suits for foreclosure or redemption or for enforcing any charge or lien in which the mortgage whereon the suit is founded, or the charge or lien sought to be enforced, shall be under the amount or value of £1000."

(2) Law Rep. 16 Eq. 153.

(a) Hen. Regal II n. 1.

decision, contended that the taxation was rightly made upon the higher scale, inasmuch as it was a suit by a legatee in which the real estate, against which the demand was made, was above the value of £1000, and therefore excepted from the lower scale rule both by the letter and spirit of Rule 1. Even assuming that the suit was one of those mentioned in Rule 3, then, although the charge in respect of which the suit was instituted was under £1000, the relief prayed was not limited to the recovery of the amount of the charge, as the bill went on to ask for additional relief by the appointment of a receiver, and therefore the case was not one for taxation on the lower scale: *Grimes* v. *Harrison* (1).

SIR JAMES BACON, V.C., said that the Rules were very express and distinct, and the suit was clearly one of those falling within Rule 3. There was no attempt in this bill to get any account or administration. It simply sought to enforce a charge created by the testator's will, and was most distinctly a suit for enforcing a charge or lien and nothing else, and the charge sought to be enforced was under the amount of £1000. The case being clearly brought within Rule 3, taxation ought to be on the lower and not on the higher scale.

Refer it back to the Taxing Master to review his taxation by taxing the costs on the lower instead of the higher scale.

Solicitors: Messrs. *Dillon Webb & Co.*; Mr. *Downing*.

(1) 27 Beav. 199. 5 Jur. N.S. 972.

V.-C. B.
1875
June 10.

## MERCHANT BANKING COMPANY *v.* MAUD.

[1867 M. 63.]

*Practice—Taxation—Third Counsel.*

Post 655.

An arrangement by which a Q.C. retained for one of the Defendants for the hearing of an appeal has been transferred to the co-Defendants to argue the case for them as leading counsel, does not justify the allowance of three counsel on party and party taxation; although only four counsel were employed between the two sets of Defendants, and the hearing of the appeal occupied several days.

ADJOURNED summons on behalf of the Defendants *Maud* and *Scrutton* for a review of the taxation, by which the brief of a third counsel, on the hearing of the appeal in this suit before the Lord Chancellor, was disallowed.

The case was heard before Vice-Chancellor *James* in February, 1870, when the Plaintiffs' bill was dismissed with costs. On that occasion *Maud* and *Scrutton* were represented by Mr. *Amphlett*, Q.C., and Mr. *Pontifex*, and their co-Defendant *Trimingham* by Mr. *W. F. Robinson;* his leader, Mr. *Druce,* Q.C., having died since he had been retained.

The Plaintiffs appealed to Lord Chancellor *Hatherley*, and on the hearing of this appeal on the 3rd, 4th, 7th, and 8th of November, and 19th of December, 1870, Sir *Roundell Palmer*, Q.C., who had been retained on behalf of *Trimingham*, was by arrangement transferred to *Maud* and *Scrutton*, and held their leading brief in addition to Mr. *Amphlett* and Mr. *Pontifex;* while *Trimingham* was represented by Mr. *Robinson* only.

The Vice-Chancellor's order was reversed by Lord Chancellor *Hatherley*, but on appeal to the House of Lords the Lord Chancellor's order was, in June, 1874, reversed, the Vice-Chancellor's order restored, and the Plaintiffs ordered to pay the Defendants their costs of suit, including the costs of their appeal to the Lord Chancellor.

In reference to the arrangement by which the retainer of Sir *Roundell Palmer* was transferred from *Trimingham* to *Maud* and *Scrutton*, it was stated that inasmuch as *Trimingham* had in the

Vice-Chancellor's Court relied only on certain technical points, and had not entered into the main defence on the facts raised by the other Defendants, it was found that his counsel would not be permitted to argue the whole case on the appeal, and consequently it was considered expedient in the interest of all the Defendants, and courteous to counsel, that Sir *Roundell Palmer* should hold the leading brief for *Maud* and *Scrutton*, and be thus able to argue the whole case—an arrangement by which, as only the usual number of counsel were employed between the two sets of Defendants, the Plaintiffs were not in any way prejudiced. Reference was also made to the magnitude and importance of the case, the proceedings in which occupied 392 printed pages.

The Taxing Master stated that he did not consider "that under the circumstances of this case it is right to allow the employment of such third counsel;" and in reference to the contention that a co-Defendant in the same interest gave up the services of Sir *Roundell Palmer* to these Defendants, and only took in one counsel himself, he did not consider that to be a question he could go into in a party and party taxation.

Mr. *W. F. Robinson*, in support of the application to review, contended that, having regard to the magnitude and length of the proceedings, and especially the arrangement by which four counsel only were engaged for two sets of Defendants, Sir *Roundell Palmer's* brief ought to have been allowed.

Mr. *Langley, contrà*, was not called on.

Sir James Bacon, V.C., did not think that the length of the proceedings in this case, or the arrangement entered into between the Defendants, afforded any ground for disturbing the disallowance by the Taxing Master of the third counsel's brief.

No order on summons.

Solicitors: Messrs. *Champion, Robinson, & Poole;* Messrs. *Flux & Co.*

V.-C. H.
1875
May 26.

## EWART *v.* CHUBB.

[1866 E. 91.]

*Practice—Divorce and Matrimonial Causes Act*, 1857 (20 & 21 *Vict. c.* 85), *ss.* 21, 25, 26—*Married Woman having obtained Protection Order—Suit by—Further Consideration—Evidence—Continuing Separation—No Settlement.*

Where, upon the further consideration of an administration suit instituted by a married woman who had obtained a protection order suing as a *feme sole* by virtue of the provisions of the Act 20 & 21 Vict. c. 85, ss. 21, 25, 26, it was proposed to pay to the married woman her share of the testator's estate, the Court:—

*Held*, that evidence must be produced that the separation was a continuing one, but accepted the affidavit of the married woman as to this fact, and also as to no settlement or agreement for a settlement having been made.

THIS was an administration suit instituted by a residuary legatee who was a married woman suing as a *feme sole* by virtue of the provisions of the Act 20 & 21 Vict. c. 85.

Before the bill was filed the Plaintiff had been deserted by her husband, and had obtained a protection order under the 21st section of the above-mentioned Act, the last clause of which section provides, that if any order of protection be made "the wife shall during the continuance thereof be and be deemed to have been during such desertion of her in the like position in all respects with regard to property and contracts and suing and being sued as she would be under this Act if she obtained a judicial separation."

By the 25th section of the Act it is enacted that "in every case of a judicial separation the wife shall, from the date of the sentence and whilst the separation shall continue, be considered as a *feme sole* with respect to property of every description which she may acquire, or which may come to or devolve upon her, . . . . provided that if such wife should again cohabit with her husband all such property as she may be entitled to when such cohabitation shall take place shall be held to her separate use." And by the 26th section it is enacted that "in every case of a judicial separation the wife shall while so separated be considered as a *feme sole* for the

purposes of contract, and wrongs and injuries, and suing and being sued in any civil proceeding."

Evidence of the continuance of the separation was produced at the hearing, and the cause now coming on for further consideration, it was proposed to take an order for payment out of Court to the Plaintiff of her share of the testator's estate.

Mr. *Davey*, for the Plaintiff:—

There is no evidence to shew that the capacity of the Plaintiff to sue as a *feme sole*, though existing at the hearing of the cause, is still a continuing one and now subsists; and it would seem that, according to the language of the 21st, 25th, and 26th sections of this Act (20 & 21 Vict. c. 85), this evidence ought to be produced. The Court, however, will perhaps, under the circumstances, be satisfied with the affidavit of the Plaintiff herself upon this point, and, moreover, will not require the husband to join in the affidavit of no settlement.

Mr. *Rodwell*, for the Defendants.

SIR CHARLES HALL, V.C.:—

Upon the construction of the 21st, 25th, and 26th sections of this Act, evidence of the continuance of the separation between the husband and wife should be produced at the hearing on further consideration. I will, however, accept the affidavit of the Plaintiff as to this fact, and I will also accept her affidavit as to there having been no settlement or agreement for a settlement.

Solicitors for the Plaintiff: Messrs. *Power, Andrew, & Wood*, agents for Mr. *W. O. Jarratt, Great Driffield;* Messrs. *Vallance & Vallance*, agents for Messrs. *Coxwell & Co., Southampton.*

V.-C. H.
1875
May 26.

## *In re* TINKLER'S ESTATE.

*Will—Trust Legacy—Tenant for Life and Remainderman—Capital and Income—Apportionment between.*

A testator bequeathed a legacy of £10,000 with interest from his death at 4 per cent. per annum to trustees upon trust to pay the income to certain persons during the life of one of them, and after her death upon trust for other persons.

The testator's estate was insufficient for payment in full of his legacies, and the realization of his assets occupied several years:—

*Held*, that moneys from time to time received by the trustees and applicable to the legacy were divisible rateably between capital and income, so as to attribute to income £4 per cent. from the testator's death on the amount attributed to capital.

MR. *WILLIAM TINKLER*, by his will, dated the 25th of June, 1849, amongst other legacies, bequeathed unto *Richard Tinkler* and *William Alexander Tinkler*, their executors, administrators, and assigns, "the sum of £10,000, with interest for the same at £4 per cent. per annum from my decease," upon trust to invest the said sum of £10,000 as in the said will mentioned, and to stand possessed of the said sum of £10,000 and the investments thereof, "and the interest, dividends, and annual proceeds thereof," upon the trusts thereinafter declared concerning the trust moneys thereinafter directed to be holden upon trust for the benefit of *Mary Ann Rachel Brunskill* and her child or children, "and the interest, dividends, and annual proceeds thereof;" and the testator declared that the receipts of his trustees or trustee for the time being should be effectual discharges "for the said sum of £10,000, and the interest thereof." The trusts for the benefit of *M. A. R. Brunskill* and her child or children thus referred to were trusts under which the trustees or trustee were from time to time during the life of *M. A. R. Brunskill* to receive the interest, dividends, and annual proceeds of the trust fund, and to pay or apply so much thereof as they thought fit upon certain trusts for the benefit of her and her children, and to invest the surplus income, and after her death to stand possessed of the trust fund and all accu-

mulations upon trust for her children living at the death of the testator, or born afterwards, and who should attain the age of twenty-one, as tenants in common. The trustees, *Richard Tinkler* and *William Alexander Tinkler*, were also the executors of the will.

The testator died in May, 1853, and his estate was not sufficient for the payment in full of the legacies bequeathed by his will. A large part of his assets consisted of a debt due from a firm to whom time for payment was given by his executors under powers contained in his will; and the failure of this firm some years after the death of the testator further delayed the realization of his estate. From time to time, however, dividends were paid by the firm in question to the executors, which dividends consisted partly of sums on account of principal, and partly of interest on the amount for the time being due. The executors divided each dividend as it was received into principal and interest, invested the principal sums towards making up the capital of the £10,000 legacy, and applied the sum which represented the interest upon the trusts declared by the will as income of the £10,000.

On the 8th of January, 1872, a decretal order for the administration of the testator's estate was made upon a summons in Chambers, taken out by the residuary legatee under the testator's will. By his certificate in this suit the Chief Clerk only allowed to the executors in respect of payments for income such interest as the capital sums so invested on account of the £10,000 had actually yielded, and disallowed them the sums so appropriated by them to interest on the £10,000 out of the dividends aforesaid, on the ground that as the estate was not sufficient to pay the legacies in full, such sums, though paid as interest, ought to be treated as capital.

The executors then took out a summons to have the certificate varied by allowing to them the sum of £1026 19*s.* 6*d.*, which represented interest after the rate of £4 per cent. per annum on the amounts from time to time invested on account of the capital of the legacy, from the death of the testator to the date of the respective investments; and this summons being adjourned into Court now came on with the further consideration of the suit.

V.-C. H. 1875 *In re* Tinkler's Estate.

Mr. *Daniel Jones*, for the Defendants, the executors, in support of the summons:—

The disallowance of these payments is plainly erroneous. The testator has himself directed that the legacy of £10,000 shall carry interest at £4 per cent. per annum from his death. This interest is specifically given to the legatees, just as much as the capital, and the persons entitled to the income of the legacy have a right to participate *pro ratâ* in whatever the estate may yield, notwithstanding the assets are insufficient for the payment of the legacies in full. The true principle is, that on each occasion when the trustees made an investment on account of capital a sum equal to £4 per cent. per annum on the amount so invested from the date of the testator's death to that of the investment should have been credited to income, and the trustees ought to be allowed on income account the aggregate amount of the interest on the sums from time to time invested, calculated on this footing.

Mr. *Gregory Walker*, for the Plaintiff, supported the finding of the Chief Clerk.

Mr. *Jason Smith*, for other Defendants.

Sir Charles Hall, V.C., said that all moneys appropriated towards the £10,000 legacy were divisible rateably between capital and income, and the certificate must be varied accordingly. His Honour then made the following order:—Declare that all moneys received by the trustees, or either of them, from the estate of the testator, *William Tinkler*, and applicable to the legacy of £10,000 bequeathed to them by the testator upon trust, were divisible rateably between capital and income, and that accordingly the Defendants, the trustees, are entitled to be allowed on account of payments made by them for income (in addition to the sums already allowed) a sum equal to £4 per cent. per annum on each sum invested by them to answer the said legacy, from the death of the testator to the date of such investment.

Solicitors: Messrs. *Allen & Son.*

## WILSON *v.* THOMSON.

V.-C. H.
1875
June 1, 2, 3.

[1874 W. 125.]

*Co-Defendants, Equities between—Costs, Adjustment of, between co-Defendants.*

A decree for specific performance of a contract having been made against two Defendants in a suit which had been rendered necessary chiefly by the misconduct of one of them, viz., *T.*:—

*Held*, that as between the two Defendants the costs ordered to be paid by both of them to the Plaintiff ought to be borne by the Defendant *T.*, and that the other Defendant should have liberty to apply in Chambers as to the payment to him by *T.* of such costs.

18 Ch D 236

### CAUSE.

The Plaintiff, *Henry Wilson*, in April, 1874, entered into negotiations with the Defendant, *John Thomson*, for the purchase of a dwelling-house and hereditaments belonging to him at *Ramsbury*, in the county of *Wilts*, which were in the occupation of the Defendant *David Timms*, whom the Defendant *Thomson* represented to be a tenant at will only. Before signing any contract with *Thomson*, the Plaintiff, on the 30th of April, called upon *Timms*, and made arrangements, in pursuance of which, on the 1st of May, the Plaintiff obtained from him a memorandum admitting that he, *Timms*, was tenant at will of the hereditaments at a rent of £30 per annum, and engaging to give up to the Plaintiff, on any day the Plaintiff might require, all the hereditaments, except the dwelling-house, and to give up the dwelling-house on the 29th of September then next, the rent up to the 24th of June next, but not afterwards, to be paid by *Timms*.

On getting this memorandum from *Timms* the Plaintiff, on the same 1st of May, entered into a contract in writing with the Defendant *Thomson* for the purchase of the property.

A few days afterwards *Timms* (at the instigation, as was alleged in the Plaintiff's evidence, of a neighbour, to whom the purchase by the Plaintiff was distasteful, claimed from *Thomson* performance of a certain prior contract, by which *Thomson* had contracted to sell the property to *Timms*. This contract had been made in the year 1870, and *Timms* having failed to carry it out, *Thomson* had, in 1872, commenced a suit against him for specific performance. In January, 1873, *Timms'* solicitor had represented

V.-C. H. 1875 WILSON v. THOMSON.

to *Thomson's* solicitor that *Timms* was absolutely without means to complete, and had offered to cancel the contract on certain terms. *Thomson's* solicitor had not accepted that offer, but had agreed to give time, and to suspend the suit, and to allow *Timms* to continue in occupation as tenant, and accordingly no further proceedings had been taken in the suit. Upon *Timms* claiming performance of that contract, *Thomson* declined to complete with the Plaintiff, who thereupon commenced the present suit against *Thomson* and *Timms*, praying for specific performance.

*Timms*, by his answer, alleged that the memorandum of the 1st of May was obtained from him by surprise, but he failed to satisfy the Vice-Chancellor that such was the case. He offered no evidence, and did not even verify his answer. *Thomson* alleged that he entered into the contract with the Plaintiff in personal ignorance of the arrangements made between his solicitor and *Timms'* solicitor in 1873, and contended that he could not safely complete with the Plaintiff after the revival of *Timms'* claim. The Plaintiff put in evidence facts tending to shew that *Timms* was still without means to complete his alleged contract.

Mr. *Greene*, Q.C., and Mr. *W. B. Heath*, for the Plaintiff.

Mr. *Woodhouse* (Mr. *Bristowe*, Q.C., with him), for the Defendant, *Thomson*, did not resist specific performance, but contended that the Plaintiff's costs should be borne by *Timms*, and that *Thomson's* costs should be paid by the Plaintiff, and recovered over by him from *Timms*, or at least that *Timms* should be ordered to pay *Thomson's* costs.

Mr. *Herbert Smith*, for the Defendant *Timms*.

SIR CHARLES HALL, V.C., delivered judgment in favour of the Plaintiff, and being of opinion that the Defendant *Timms* had no interest in the property comprised in the contract, decreed specific performance of such contract against the Defendant *Thomson*.

Upon the question of costs, His Honour said:—

The Plaintiff must have costs against both the Defendants, but I consider that *Timms* is the person whose misconduct has brought about this suit, and I should like to make him bear the costs as between himself and *Thomson* if I have jurisdiction to do so. It has been suggested that I should order the Plaintiff to pay

*Thomson's* costs, and give the Plaintiff those costs against *Timms*, but I will not imperil the Plaintiff in that way. He may never be able to recover anything from *Timms*. Besides, I have held the Plaintiff to be entitled to costs against *Thomson* as well as *Timms*.

Relief cannot ordinarily be given as between co-Defendants: I think, however, that I have jurisdiction to declare that costs which the Plaintiff may recover from *Thomson* shall be repaid to *Thomson* by *Timms*, on the authority of a case in which I was engaged, and which I will search for and refer to.

[Mr. *Morgan*, Q.C., as *amicus curiæ*, afterwards stated that he thought the case His Honour referred to was *Lockhart* v. *Reilly*, *Reilly* v. *Lockhart* (1).]

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June 3. SIR CHARLES HALL, V.C.:—

*Lockhart* v. *Reilly*, *Reilly* v. *Lockhart* is the case I had in my mind. Certain proceedings were taken upon petitions in those suits which are reported in 25 L. J. (Ch.) 697; to that report I have referred, and it appears that Lord *Cranworth* made an order therein containing a declaration that, as between certain trustees, who were co-Defendants to the suit of *Reilly* v. *Lockhart*, the costs of that suit, which by the decree were ordered to be paid by both co-Defendants, ought to be borne by one of them, as mentioned in the report. On the authority of that case I consider that I have power to insert, and I accordingly will insert, in this decree a declaration that as between the Defendants the costs ordered to be paid by the Defendants ought to be borne by *Timms*, and the Defendant *Thomson* must have liberty to apply in Chambers as to payment to him of such costs. This will of course in no way affect the Plaintiff's right to recover his costs from both the Defendants, or either of them.

Solicitors for the Plaintiff: Messrs. *Phelps & Sidgwick.*

Solicitors for the Defendant *Thomson:* Messrs. *Wright & Pilley.*

Solicitors for the Defendant *Timms:* Messrs. *Rickards & Walker*, agents for Mr. *W. H. Cave, Newbury.*

(1) 1 De G. & J. 464.

V.-C. H.
1875
June 3.

## ALLEN *v.* MARTIN.

[1874 A. 132.]

*Ornamental Garden—Contract with Agent of Lessees of Houses—Right of Owners in Fee—Breach of Contract—Equitable Jurisdiction—Injunction.*

The owner in fee of a garden over which the tenants of his adjoining houses had rights of enjoyment and management:—

*Held* entitled to an injunction to restrain continuing trespasses involving nuisances in the garden committed by a person acting under colour of a contract to improve the garden entered into between him and the tenants.

THE Plaintiffs, *G. H. Allen* and the Rev. *W. Smith*, as the trustees under the will of the late Lord *Southampton*, were entitled in fee simple to the ornamental gardens in *Euston Square*, and also entitled, but in reversion, to the houses abutting upon the square. The occupiers of the houses were entitled to the enjoyment of the gardens, and the Defendant *G. F. Graham*, an estate agent in the neighbourhood, had, for some time past, on their behalf, had the management of the garden south of the *Euston Road*. In the summer of 1874, the Defendant *Graham* proposed to make alterations and improvements in that part of the gardens, by having the soil raised, and other things done, and for that purpose the Defendant *J. H. Martin*, on the 14th of October, 1874, entered into a contract with him "to execute and perform the whole of the following works for the sum of £60, payable on completion: to remove the iron railings to the southern inclosure of *Euston Square*, to form draw-in for carts, to take up the several grass plots, move the surface mould, and to fill in a new bottom with good hard core of an average depth of two feet, re-lay mould and plots with new where necessary, prick up the gravel walks, and fill in with hard core to a uniform level, and alter and make good all drains, provide and lay 200 yards of good hard binding garden gravel, remove the plants, shrubs, and mould from beds and borders, fill in to a proper and approved level with 400 yards of good mould, replant shrubs, &c., with part new, and lay new grass verges, repair and refix all iron work to north side of southern inclosure, make good all damage done, and clear away all rubbish, the whole of the

work to be executed in a good and workmanlike manner, and to the entire satisfaction of" the Defendant *Graham*. The Defendant *Martin* commenced the works, and in November he, without any authority from the Defendant *Graham*, commenced digging out and selling the sand subsoil of the garden, and allowed hoardings for advertisements to be erected along the front of the garden. The Plaintiffs and the Defendant *Graham* remonstrated with him, and he then promised that the digging of sand should be discontinued, the hoardings removed, and that the works should in future be done to the Defendant *Graham's* satisfaction. In December, the Defendant *Martin* again allowed hoardings to be erected along the whole front of the garden by Messrs. *Willing & Co.*, and instead of bringing on to the garden good hard core for the purpose of raising the ground, he allowed the garden to be made a place for dust-bin rubbish, and other offensive matters, street sweepings and slush, for which he received payment for every cartload brought there. Fires were lighted in the garden, at which were burnt old paper, straw, and other combustible rubbish, and a nuisance was caused to the occupiers of the adjacent houses. The Plaintiffs, finding remonstrance unavailing, filed, on the 22nd of December, 1874, this bill to restrain the Defendant *Martin* from entering or remaining upon the garden, and from carting, bringing, or laying any soil or other matter or material therein, and from in any way dealing or interfering with the same until the further order of the Court, and for damages and costs of the suit. Upon an *ex parte* application, made immediately after the bill was filed, the Plaintiffs obtained an order restraining the Defendant *Martin* from entering on the garden. In February that order was relaxed, and he was allowed to continue the works, but in March an injunction was granted against the Defendant *Martin*, the Plaintiffs adducing evidence which shewed that he was again bringing on to the garden objectionable materials, and digging up the sand. The cause now came on to be heard, on motion for decree. The Defendant *Martin*, in cross-examination, stated that he had allowed 250,000 loads of matter to be deposited in the garden, for which he had received sums varying from 6*d.* to 1*s.* for each cart-load. The written and oral evidence, in the view of the Court, established

V.-C. H. 1875 ALLEN v. MARTIN.

that after the interview in November, 1874, between the Defendants *Graham* and *Martin*, and the solicitor of the former and of the Plaintiffs, a large quantity of dust-bin rubbish was from time to time brought on to the garden by the Defendant *Martin*; that during the same period some of the dust-bin rubbish was burnt in the garden, thereby creating a nuisance of such magnitude as to be cognizable by this Court; that the Defendant *Martin* during the same period made excavations in the garden to a greater extent than was necessary for the proper execution of the works mentioned in the contract, and that the Plaintiffs when they filed their bill were warranted in concluding that such conduct on his part would be continued.

Mr. *Dickinson*, Q.C., and Mr. *Edward J. Foster*, for the Plaintiffs, after referring to the case of *Goodson* v. *Richardson* (1), contended that there was sufficient privity of contract between them and the Defendant *Martin* to entitle them, on behalf of themselves and their lessees of the adjacent houses, to ask the Court for an injunction to restrain him from committing further waste and spoliation in the garden; and from further continuing the nuisance to which the lessees and occupiers of the houses had been subjected. The Plaintiffs were entitled to an injunction to protect their property, and the rights of their lessees, from injury.

Mr. *Greene*, Q.C., and Mr. *Romer*, for the Defendant *Martin*, submitted that there was no privity of contract between him and the Plaintiffs, as the contract was between him and the agent of the lessees or occupiers of the adjacent houses, and was not binding upon the Plaintiffs at all, for they had not adopted it. The case of *Goodson* v. *Richardson* was a distinct authority in the Defendant *Martin's* favour. The question was, had the Defendant *Martin* injured the freehold? and there was no proof that he had, therefore the Plaintiffs had no just cause of complaint; further, no injury had been done to the adjacent houses, and as to them, therefore, the Plaintiffs, who were merely reversioners, had no ground of complaint. The smoke from the fires might have annoyed the occupiers, but that was no ground to entitle the

(1) Law Rep. 9 Ch. 221.

Plaintiffs to come to that Court for relief: *Mott* v. *Shoolbred* (1). The Plaintiffs' evidence had not established that there had been any injury committed, and if the facts alleged had been proved, their remedy would be by action in ejectment.

SIR CHARLES HALL, V.C.:—

I do not propose to grant an injunction against the Defendant *Martin* in the terms asked and turn him out of the garden, nor do I intend to order an inquiry as to damages, but I shall grant an injunction to restrain him, his servants, agents, and workmen, from making any excavation in the garden to a greater extent than will be required for the purpose of the works mentioned in the contract, and that will prevent the removal of gravel or sand from the garden; also from using for the purpose of such works anything other than such hard core or other proper materials as are mentioned in the contract, and also from bringing upon the garden, or allowing to remain there, or burning in the garden, the dust-bin or other rubbish not mentioned in the contract. [After stating the result of the evidence as above set forth, His Honour continued:—] I am of opinion that the Plaintiffs were right in coming to this Court for an injunction to prevent a repetition of the acts and nuisances complained of, and that the Court ought to grant, in the terms which I have already stated, a perpetual injunction to prevent their repetition. In reference to the argument that this is not a case in which this Court ought to interfere by injunction, I may observe that the Plaintiffs are in the position of owners in fee simple of the garden in question, subject to certain rights of their tenants, the occupiers of the adjacent houses. The Plaintiffs are also in the position of reversioners expectant on the determination of the leases held by the lessees, the tenants or the occupiers of those houses. The rights which those lessees or occupiers have in the garden are of some importance to them, and the Plaintiffs have no right to interfere with or prevent those rights being fairly and properly exercised. The occupiers of the houses contribute towards the expenses incurred in keeping the garden in good order, and they appoint

(1) *Ante*, p. 22.

V.-C. H. 1875 ALLEN v. MARTIN.

some one, at present the Defendant *Graham*, their representative or agent, to make arrangements for that purpose, and he, on their behalf, entered into the contract of the 14th of October, 1874, with the Defendant *Martin*, who undertook to do works which involved very considerable alterations in the garden. The Plaintiffs might, perhaps, having regard to their actual position as owners of the garden, have said that such works should not be done; that the contract by the Defendant *Graham* was beyond his power or that of the occupiers to enter into, but when the conduct of the Defendant *Martin* was brought under their notice they acted like reasonable men, and, indeed, in their own interest, and they allowed their solicitor to attend the meeting at the end of November, 1874, at which the Defendant *Martin* was remonstrated with and threatened with legal proceedings for digging and selling the sand, and at which he promised that in future he would do the works in accordance with the terms of the contract and to the satisfaction of the Defendant *Graham*. In that way there sprung up between the Plaintiffs and the Defendant *Martin* something very much like a contract, and from that time the Plaintiffs' agent watched the Defendant *Martin's* proceedings, and from time to time interfered with him in regard to them. When the Plaintiffs found that the Defendant *Martin* was doing things which he was not authorized to do, particularly having regard to the arrangement come to at the end of November, they no doubt might, as legal owners of an estate in possession, subject only to the rights of the lessees and occupiers of the houses, have taken steps to eject him, but if they had adopted that course it would probably have led to further litigation and brought about proceedings at law which might have been considered harsher than the necessities of the case required. The Plaintiffs took a different course. They knew they were entitled to the legal estate and could bring an action in ejectment, against which probably the Defendant *Martin* would have had no good defence; but as they found him continually committing fresh trespasses and nuisances—for every time he brought on to the garden any of the objectionable materials mentioned a fresh trespass was committed, and every time he burnt any of those materials a fresh nuisance was committed, and every time he removed any sand from the garden there

was a new trespass to and spoliation and waste of their property—they filed this bill. It was contended that this Court has, in that state of things, no jurisdiction to interfere by way of injunction, and that the decision in *Goodson* v. *Richardson* is not only not an authority in favour of the Plaintiffs, but that it is in favour of the Defendant *Martin*. In my opinion, however, that case is in favour of the Plaintiffs, for Lord *Selborne* said (1): "I cannot look upon this case otherwise than as a deliberate and unlawful invasion by one man of another man's land for the purpose of a continuing trespass, which is in law a series of trespasses from time to time to the gain and profit of the trespasser without the consent of the owner of the land, and it appears to me as such to be a proper subject for an injunction;" and Lord Justice *James* said (2): "The Defendant in this case is admittedly a trespasser . . . and he proposes to continue that trespass from day to day. . . . It is said that we ought to allow this to be done, that we ought, in fact, to dismiss the Plaintiff from this Court, and tell him to find his way to another Court, in which he is to bring an action for the wrong, for which there is no defence whatever. . . . I do not know whether more than one will be required—and then having succeeded in one action or two actions, or perhaps three actions, all of which on the facts proved in this case would necessarily result in verdicts for him, he is to come back to this Court and obtain a perpetual injunction on the ground of repeated vexation and repeated actions. I do not think that there is any principle in this Court which will compel us to drive the Plaintiff to go through all that litigation before he is entitled to that relief which he would ultimately get when he had gone through it." If the Plaintiffs had to go through all those processes, and be obliged to leave their property all the time exposed to the wrongful acts complained of, it would be a most disgraceful state of things, and if such a state of things is to receive judicial countenance I shall not be the first Judge to do it, especially considering that after November next each Court will be capable of disposing of every case brought before it. But however that may be, there is in my opinion even now in this Court ample jurisdiction in a case of this kind to protect the property of the Plaintiffs, and therefore I propose to give them the relief which I have

(1) Law Rep. 9 Ch. 224. (2) Law Rep. 9 Ch. 226.

V.-C. H. 1875 ALLEN v. MARTIN.

already stated, and I grant that relief the more readily considering the interest of the Plaintiffs in the garden; their peculiar position in reference to their lessees and occupiers of the adjacent houses, and their being not unreasonably associated with the Defendant *Graham;* the threatened action in ejectment against the Defendant *Martin*, and the violation of the arrangement which he entered into at the end of November, 1874, with the Plaintiffs, and which has aided, if not indeed created, the jurisdiction of the Court over this case. The costs of the motion must be costs in the cause, and the Defendant *Martin* must pay them all, and there will be liberty to apply.

Solicitor for the Plaintiffs: Mr. *John Hopgood*, agent for Mr. *Jacob Birt.*

Solicitor for the Defendant: Mr. *Drawbridge.*

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V.-C. H. 1875 *June* 4.

## *In re* FRYER'S SETTLEMENT.

## FRYER *v.* SALISBURY AND DORSET JUNCTION RAILWAY COMPANY.

[1868 F. 114.]

*Lands Clauses Consolidation Act*, 1845, *ss.* 69, 70—*Interim Investment—Cash under the Control of the Court—East India* £4 *per Cent. Stock.*

Purchase-money paid into Court in respect of land taken by a railway company under the *Lands Clauses Consolidation Act*, 1845, is cash under the control of the Court, and accordingly the Court has power to direct the investment thereof in *East India* £4 per Cent. Stock.

*In re Boyd's Settled Estate* considered.

THIS was a Petition presented in the above matter and suit by the tenant for life of settled lands, asking that the purchase-money paid into Court by a railway company who had taken part of the lands under the provisions of the *Lands Clauses Act*, 1845, might be laid out in the purchase of *East India* £4 per Cent. Stock, and that the dividends thereon might be paid to the Petitioner during his life.

Mr. *Rigby*, for the Petitioner:—

Lord *Selborne*, L.C., while sitting for the Master of the Rolls, in

*In re Boyd's Settled Estate* (June 2, 1873), which was a petition under the *Leases and Sales of Settled Estates Act* (19 & 20 Vict. c. 120), held that a fund arising from settled estates sold under the order of the Court was not cash under the control of the Court, and refused, on the application of the tenant for life, to make an order for the investment of the fund on mortgage; but in so doing his Lordship conceived that he was following the last decision of the Master of the Rolls in *In re Shaw's Settled Estates* (1), whereas, in point of fact, he was overruling the Master of the Rolls' last decision, for at that time the last decision of the Master of the Rolls upon the point was not in *In re Shaw's Settled Estates*, but *Reading* v. *Hamilton* (April 20, 1872), and in that case the Master of the Rolls did not follow his previous decision in *In re Shaw's Settled Estates*, but followed his former decision in *In re Cook's Settled Estates* (2). In *In re Taddy's Settled Estates* (3), Vice-Chancellor *Malins* declined to follow *In re Boyd's Settled Estate*, and held that purchase-moneys arising from the sale of settled lands might be invested as cash under the control of the Court. These are all cases under the *Settled Estates Act*, but the 70th section of the *Lands Clauses Consolidation Act*, 1845, which provides for the interim investment of purchase and compensation moneys is analogous to the 25th section, which is the interim investment clause of the *Settled Estates Act*, only that the former specifies £3 per Cent. Consols, 3 per Cent. Reduced, and Government and real securities, while the latter merely mentions Exchequer Bills and £3 per Cent. Consols. The same principles however, apply, and the result of the authorities is in favour of sanctioning the investment we ask.

Mr. *Millar*, for the Respondents, the railway company, and the other Defendants in the suit.

The VICE-CHANCELLOR made the order, directing the purchase-moneys to be invested in *East India* £4 per Cent. Stock, and the dividends thereon to be paid to the Petitioner during his life.

Solicitors: Messrs. *Kingsford & Dorman;* Messrs. *Ashurst, Morris, & Co.*

(1) Law Rep. 14 Eq. 9. (2) Law Rep. 12 Eq. 12.
(3) Law Rep. 16 Eq. 532.

V.-C. H.

1875

*June* 11.

## *In re* MORRIS' SETTLED ESTATES.

*Practice—Lands Clauses Act*, 1845—*Interim Investment—Tenant for Life—Incumbrancers—Petition—Service—Costs.*

When a tenant for life petitions for the interim investment of purchase-moneys paid in by a railway company under the *Lands Clauses Act*, and for the payment to him of the dividends thereon when invested, it is not necessary for him to serve persons having charges on the inheritance prior to the life estate, and the costs of such parties, if served, will not be allowed as against the company.

THIS was a Petition by Sir *John Morris*, a tenant for life, asking for the investment in bank annuities of purchase-moneys paid in by a railway company under the *Lands Clauses Act*, and for the payment to him of the dividends thereon. The inheritance was subject to charges prior to the estate of the tenant for life in favour of a jointress, portioners, and ordinary mortgagees. The tenant for life had also incumbered his life estate. The Petition had been served upon the incumbrancers, whose charges were prior to the estate of the tenant for life, but not upon the incumbrancers of the life estate. The company disputed their liability to pay the costs of the incumbrancers served.

Mr. *W. Renshaw*, for the Petitioner:—

Although it is not necessary upon Petitions of this nature to serve incumbrancers upon the life estate, it is necessary, and according to the usual practice, to serve incumbrancers whose charges are prior to the estate of the tenant for life, and the company must pay the costs of such incumbrancers: *Morgan's* Chan. Acts and Orders (1); *Re Brooke* (2).

Mr. *Methold*, for the company:—

The company cannot be called upon to pay the costs of these incumbrancers: *In re Webster's Settled Estates* (3); *In re Gore Langton's Estates* (4); *Daniell's* Chancery Practice (5). If it is not necessary to serve incumbrancers on the life estate, *à fortiori* it is not necessary to serve incumbrancers on the inheritance.

(1) 4th Ed. p. 51.
(2) 30 Beav. 233.
(3) 2 Sm. & Giff. App. vi.
(4) Law Rep. 10 Ch. 328.
(5) 5th Ed. p. 1879.

Mr. *J. S. Colquhoun*, for the incumbrancers.

SIR CHARLES HALL, V.C.:—

As the practice seems to be in an unsettled state, I shall in the present case order the company to pay the costs of the incumbrancers served, but I wish it to be understood that I do not consider it necessary on a petition for the interim investment of purchase-moneys paid in by a railway company under the *Lands Clauses Consolidation Act*, and for payment of the dividends to a tenant for life, to serve persons having charges on the inheritance, and that in future I shall disallow the costs of such incumbrancers as against the company.

Solicitors for the Petitioner: Messrs. *Horn & Murray.*
Solicitors for the Company: Messrs. *Markby, Tarry, & Stewart.*
Solicitors for the Incumbrancers: Messrs. *Parkin & Pagden.*

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## HARLOE *v.* HARLOE.



[1868 H. 262.]

*Will—Construction—Testamentary Expenses—Costs of Administration Suit.*

A direction in a will to pay testamentary expenses and debts includes the costs of an administration suit.

*In re Biel's Estate* (1) distinguished.

*CHARLES HARLOE*, who died in March, 1867, by his will, made in August, 1862, after making certain specific devises and bequests, bequeathed seven leasehold houses, subject to the payment of the rents and the performance of the covenants, unto trustees upon trust to sell and to stand possessed of the moneys to arise from the sale, and to pay his funeral and testamentary expenses and debts, and also the costs and expenses of and relating to the sale, and out of the residue to pay certain legacies. The ultimate residue of that fund he bequeathed upon trust for his reputed son absolutely, and the residue of his real and personal estate to other persons. One of the specific legatees, in December, 1868, filed the bill in this cause for the administration of the real and personal

(1) Law Rep. 16 Eq. 577.

V.-C. H. 1875 HARLOE v. HARLOE.

estate of the testator. The seven leasehold houses were sold, and out of the proceeds the funeral and testamentary expenses and legacies were paid. The principal question was whether, under the direction to pay the testamentary expenses and debts, the costs of the suit could be included.

Mr. *Ince*, Q.C., and Mr. *Dundas Gardiner*, for residuary legatees, after referring to *Morrell* v. *Fisher* (1) and *Miles* v. *Harrison* (2), submitted that there was a distinct trust to pay the funeral and testamentary expenses and debts out of the proceeds of sale of the leasehold houses, and that upon the authority of those cases the costs of administration of the estate by the Court were included, and ought to be paid out of the same fund; though they admitted that in the case of *In re Biel's Estate* (3) it was held by Vice-Chancellor *Wickens* that the costs of administration were not included in a direction to pay funeral and testamentary expenses. But in principle, the administration of an estate, whether by the assistance of the Court or not, was the same; and therefore the costs of administration were included in testamentary expenses and debts.

Mr. *W. Pearson*, Q.C., and Mr. *E. Ward*, for the Defendant, contended that the costs of administration were not included in the direction to pay funeral and testamentary expenses and debts, and that they ought to be paid out of the general residue; that the decision in *In re Biel's Estate* was a distinct authority for that proposition, and that it supported the view taken in *Webb* v. *De Beauvoisin* (4) and in *Gilbertson* v. *Gilbertson* (5). They also submitted that the decision in *Morrell* v. *Fisher* could not be considered as an authority on the general question; and that in *Miles* v. *Harrison* the question was one of marshalling; and they referred to *Morgan* and *Davey* on Costs (6) to shew that their view of the law was the correct one.

SIR CHARLES HALL, V.C.:—

I am of opinion that I cannot view the decision in the case of *Miles* v. *Harrison* otherwise than as an authority for holding that

(1) 4 De G. & Sm. 422.
(2) Law Rep. 9 Ch. 316.
(3) Ibid. 16 Eq. 577.
(4) 31 Beav. 573.
(5) 34 Ibid. 354.
(6) Page 115.

under a direction in a will to pay testamentary expenses and debts the costs of an administration suit are included. The main question which arose in that case was one of marshalling assets in favour of charities; but there were other questions, including that of costs. There was in that case a trust to pay funeral and testamentary expenses and debts, and legacies, and to invest the remainder in the manner in the will mentioned; and the Lord Chancellor, after referring to that trust, said: "That appears to me to be a charging of the whole aggregate fund in the hands of the trustees with all his debts and legacies and administration expenses;" and subsequently, after a contention in reference to the fund out of which the costs of administering the estate should be paid, the Lord Chancellor said: "The estate could not have been administered without the direction of the Court. We think that all the costs of the suit in the Court below, and the costs of the executors of the appeal, must be paid out of the impure personalty."

In the cases of *Gilbertson* v. *Gilbertson* (1) and *Stringer* v. *Harper* (2), the late Master of the Rolls considered that, under the direction to pay testamentary expenses, the costs of administration by the Court were not included; but in the earlier case of *Webb* v. *De Beauvoisin* (3) the same learned Judge held that the words "and other expenses" were sufficient to include such costs. I consider that under the words used by the testator costs of the suit are included, and, notwithstanding the attempt made to distinguish this case from *Morrell* v. *Fisher* (4) and *Miles* v. *Harrison* (5), I do not think the distinction is sufficiently substantial for me not to follow them. The case decided by Vice-Chancellor *Wickens* depended upon its own special circumstances, and is not applicable to the general question: at any rate, I think the present case is covered by the decision in *Miles* v. *Harrison*, and therefore I hold that, under the words testamentary expenses, the costs of the suit are included.

Solicitors: Mr. *F. Kent;* Mr. *T. Angell;* Messrs. *Dean & Taylor.*

(1) 34 Beav. 354.
(2) 26 Ibid. 585.
(3) 31 Beav. 573.
(4) 4 De G. & Sm. 422.
(5) Law Rep. 9 Ch. 316.

M. R.
1875
May 28.

## RUSSELL *v.* WAKEFIELD WATERWORKS COMPANY.

[1875 R. 43.]

*Company—Suit by Shareholder on behalf of Himself and other Shareholders—Illegal Payment by Directors—Ultrà Vires—Form of Suit.*

Where a shareholder in an incorporated company filed his bill on behalf of himself and all other shareholders against the directors and the promoters of a bill in Parliament for a rival purpose, alleging an illegal payment of the company's money to such promoters to buy off their opposition, and praying that it might be replaced:—

*Held*, on demurrer, that it was not sufficiently alleged in the bill that the payment was *ultrà vires:*

*Held*, also, there being no allegation that the company would not sue, that it was not a case in which the suit could be maintained in its present form; and that the demurrer must be allowed, with leave to amend.

Observations on the exceptions to the general rule, that the company and not an individual corporator must sue when the trust funds of the company have been misapplied.

### DEMURRER.

The bill was filed by the Plaintiff *Henry Edward Russell*, on behalf of himself and all other the shareholders in the *Wakefield Waterworks Company*, except such of the Defendants as were shareholders therein.

The Defendants were the said *Wakefield Waterworks Company*, the six directors of the same company, and the six promoters of an undertaking called the *Wakefield and District New Water Bill.*

The bill alleged that in the year 1874 the Plaintiff became, by purchase, the duly registered owner of two fully paid-up shares in the Defendant company; that he afterwards heard of the payment of £5500 to the promoters of the *Wakefield and District New Water Bill* to buy up their opposition; that in the balance-sheet for the half-year ending the 30th of June, 1874, there was the following entry in the capital account: "Parliamentary expenses, £8517 14*s.* 9*d.*"; and that the balance-sheet for the half-year ending the 31st of December, 1874, contained the following entry: "Parliamentary expenses, £9083 10*s.* 11*d.*"; but that neither the balance-sheets nor the reports contained any explanation of these entries:

That the Plaintiff's solicitor was informed by the secretary to the company that the sum of money paid to the promoters of the New Water Bill was included in the said sum of £8517 14*s.* 9*d.*, and charged to the capital account of June, 1874, and was paid by the directors in accordance with a resolution of the shareholders, authorizing them to do all necessary acts, and in exercise of the lawful powers of the directors, and that the accounts containing the payments had since been passed and confirmed by the shareholders:

That the Plaintiff had ascertained the following facts with reference to the transaction in question:—During the session of Parliament in the year 1874 the Defendants, the directors of the waterworks company, introduced a bill into Parliament authorizing them to make new reservoirs and works, and to raise more money, and to extend their limits of supply. During the same session a bill was introduced by the Defendants, the promoters thereof, intituled the *Wakefield and District New Water Bill*, whereby it was proposed to erect waterworks of a similar character to those proposed by the Defendant company for the supply of *Wakefield* and its neighbourhood, and the promoters lodged a petition against the bill introduced by the said directors. On the 9th of April the promoters of the *Wakefield and District New Water Bill* withdrew their bill, such withdrawal being, as the Plaintiff alleged, the result of a corrupt agreement made between the promoters of that bill and the directors of the Defendant company, and which was in the following terms:—

"Terms of arrangement between the *Wakefield Waterworks Company* and the *Wakefield New Waterworks Company* made this 7th of April, 1874. The directors of the *Wakefield Old Waterworks Company* pledge their words as men of honour to proceed with their present application to Parliament for a supply of water from *Langsett*, and to use their utmost endeavours to secure the passing of their new bill in both Houses of Parliament during the present session, and will also pay to the directors of the *Wakefield New Waterworks Company* the sum of £5500 for the costs and expenses incurred by them in connection with their present scheme, on condition that the *Wakefield New Waterworks Company* do forthwith withdraw their bill now before Parliament, and

M. R. 1875 RUSSELL v. WAKEFIELD WATERWORKS COMPANY.

also withdraw at once the petition filed by the *Wakefield New Waterworks Company* and the inhabitants and consumers of water in *Wakefield* and its neighbourhood, recently lodged or filed, and do use their influence, and do render all the assistance in their power to the directors of the *Wakefield Old Waterworks Company* (if and when required by them) at the expense of the said last-named company, to secure the passing of the present bill of the *Wakefield Old Waterworks Company*, now before Parliament, into law during the present session of Parliament. As witness the hands of the directors of the said two companies." This agreement was signed by the several Defendants the directors of the Defendant company, and by the several Defendants the promoters of the said bill, on the 7th of April, 1874, and on or about that date the directors of the Defendant company paid to the promoters of the said bill out of the moneys of the Defendant company the sum of £5500.

The bill alleged that the promoters had express notice that the sum of £5500 was paid out of the moneys of the Defendant company, and that the directors had no authority so to pay the same; that no general meeting of the shareholders of the Defendant company was held, and no resolution passed for the purpose of authorizing the said agreement, or the payment of the said £5500.

The Plaintiff insisted that the transaction was illegal, and that its illegality was known to the directors and promoters; and he charged that the said sum of £5500 was illegally paid out of the capital and funds of the Defendant company to the said promoters, and that they received such moneys with full notice and knowledge that the same was being so paid to them illegally, and by a breach of trust; that the promoters concurred in such breach of trust; and that the directors and promoters were liable to repay the same.

The bill prayed that it might be declared that the agreement of the 7th of April, 1874, and the said payment of the sum of £5500 were not within the powers of the Defendant company; that an account might be taken of the moneys so paid, and that the Defendants, the directors and promoters, might be ordered to repay the same.

The Defendants demurred generally for want of equity.

Mr. *Bagshawe*, Q.C., and Mr. *Bunting*, for the Defendants, in support of the demurrer:—

This bill seeks to recover back a sum of money paid by the Defendants, the directors of the waterworks company, to the other Defendants, the promoters of the bill which was withdrawn, on the ground that such payment was *ultrà vires;* but there are, we submit, no sufficient allegations in the bill to shew that the act complained of was beyond the powers of the directors.

Further, the suit is wrongly framed. A bill like this, to recover moneys belonging to a corporate body alleged to be improperly paid to a stranger, cannot be filed by an individual shareholder, unless it is distinctly alleged that the corporation or company have refused to sue, or that there is some reason which prevents the company from suing: *Gray* v. *Lewis* (1); *Mozley* v. *Alston* (2); *Foss* v. *Harbottle* (3).

It is not alleged in this bill either that the Defendant company has refused to sue, or that it is incapable of suing: on these grounds, therefore, as well as on the first, we contend that the demurrer should be allowed.

Mr. *Chitty*, Q.C., and Mr. *W. W. Cooper*, for the Plaintiff, in support of the bill:—

The conduct of the directors of the waterworks company in entering into the agreement with the promoters of a rival company, and paying them the sum of £5500 to buy off their opposition, was, on the facts alleged in the bill, both illegal and *ultrà vires*. The directors were in the position of trustees for the company, and, as such, they are liable in this Court to account for the company's money which they have misapplied. The bill alleges that the promoters received the money with notice that it was the property of the company. That would be sufficient to render them in this Court liable to account for it: *Ferguson* v. *Wilson* (4); *Hodgkinson* v. *National Live Stock Insurance Company* (5); *Maunsell* v. *Midland Great Western (Ireland) Railway Company* (6); *Atwool* v. *Merryweather* (7).

(1) Law Rep. 8 Ch. 1035.
(2) 1 Ph. 790.
(3) 2 Hare, 461.
(4) Law Rep. 2 Ch. 77.
(5) 4 De G. & J. 422.
(6) 1 H. & M. 130.
(7) Law Rep. 5 Eq. 464, n.

M. R.
1875
RUSSELL
v.
WAKEFIELD
WATERWORKS
COMPANY.

In *Salomons* v. *Laing* (1), where money belonging to one railway company had been improperly paid over by the directors to the directors of another company who had notice of the breach of trust, and a bill was filed by a shareholder of the first company on behalf of himself and the other shareholders against the directors of both companies to recover back the fund, it was held on demurrer that the directors of the second company were properly made parties to the suit, and also that such a suit might be instituted by an individual shareholder, although it was not alleged that the company had refused to sue. That case is a direct authority in favour of the bill being framed in its present form.

Mr. *Bagshawe*, in reply, on the question whether the Plaintiff should have leave to amend.

SIR G. JESSEL, M.R.:—

I am of opinion that this bill is open to general demurrer on two grounds. The nature of the case which I suppose was intended to be made by the bill is that the waterworks company were not authorized to pay a sum of £5500 to the promoters of an opposition company, who were opposing a bill for extending the powers of what I will call the old company, in order to buy off the opposition. The bill seeks to make liable both the directors of the old company who had paid the money and the promoters of the new company who received the money.

The two objections, which I think are well founded, are these: first, it is said there is no case made by the bill shewing that the act complained of was beyond the powers of the old company, there being no direct allegation of fraud, although the word "corrupt" is used; and secondly, it is said that, even if the act complained of was shewn to be *ultrà vires*, it was a case in which the old company, which was an incorporated company, ought to sue. [His Honour then reviewed the allegations in the bill, and considered that the bill did not sufficiently allege that the payment complained of was beyond the powers of the old company.]

A great deal of the argument in this case turned upon what

(1) 12 Beav. 377.

may be described perhaps, in one sense, as a technical objection, but which is a very formidable and important objection. It was said that this is a bill to make a stranger pay back money belonging to a company which the stranger has illegally or improperly possessed himself of, or appropriated to his own use, and that any person who takes possession of a trust fund is liable to be sued in equity by the owner of the trust fund if he had notice at the time that it was a trust fund; and although he gave value, still in that way the bill can be maintained against him.

The answer was, that where the owner of the trust fund is an incorporated company, the corporation is the only party to sue; the stranger has nothing whatever to do with the individual corporators; and although in a sense it is their property, because individual corporators make up the corporation, yet in law it is not their property, but the property of the corporation, and therefore the right person to sue is the corporation, who is the *cestui que trust* or equitable owner of the fund. That I take to be the general rule of this Court. In this Court the money of the company is a trust fund, because it is applicable only to the special purposes of the company in the hands of the agents of the company, and it is in that sense a trust fund applicable by them to those special purposes; and a person taking it from them with notice that it is being applied to other purposes cannot in this Court say that he is not a constructive trustee.

But the general rule being that the *cestui que trust* must sue, and not the individual corporator who has only an ultimate beneficial interest, the only point remaining to be considered is, whether there are any exceptions to the general rule. I entirely agree that the general rule, if I may say so respectfully, is correctly stated by Lord Justice *James* in the case of *Gray* v. *Lewis* (1): "Where there is a corporate body capable of filing a bill for itself to recover property, either from its directors or officers, or from any other person, that corporate body is the proper plaintiff, and the only proper plaintiff." I do not understand the Lord Justice to intend to state more than the general rule, because he began by saying: "It is very important, in order to avoid oppressive litigation, to adhere to the rule laid down in *Mozley* v. *Alston* (2), and *Foss* v.

(1) Law Rep. 8 Ch. 1035, 1050. (2) 1 Ph. 790.

M. R.
1875
RUSSELL
v.
WAKEFIELD
WATERWORKS
COMPANY.

*Harbottle* (1), which cases have always been considered as settling the law of this Court." So that in laying down the general rule he did not intend to impeach or interfere with those cases, but only to express the result of them. In reality *Mozley* v. *Alston* (2) simply affirmed *Foss* v. *Harbottle*, and therefore when you want to find the rule you must look to *Foss* v. *Harbottle*, where you will find the general rule is that which I have stated. But that is not a universal rule; that is, it is a rule subject to exceptions, and the exceptions depend very much on the necessity of the case; that is, the necessity for the Court doing justice.

In *Foss* v. *Harbottle* (3) Vice-Chancellor Sir *J. Wigram* says this: "The first objection taken in the argument for the Defendants was that the individual members of the corporation cannot in any case sue in the form in which this bill is framed. During the argument I intimated an opinion to which, upon further consideration, I fully adhere, that the rule was much too broadly stated on the part of the Defendants. I think there are cases in which a suit might properly be so framed. Corporations like this of a private nature are in truth little more than private partnerships, and in cases which may easily be suggested it would be too much to hold that a society of private persons associated together in undertakings which, though certainly beneficial to the public are nevertheless matters of private property, are to be deprived of their civil rights *inter se* because, in order to make their common objects more attainable, the Crown or the Legislature may have conferred upon them the benefit of a corporate character. If a case should arise of injury to a corporation by some of its members, for which no adequate remedy remained except that of a suit by individual corporators in their private characters, and asking in such character the protection of those rights to which in their corporate character they were entitled, I cannot but think that the principle so forcibly laid down by Lord *Cottenham*, in *Wallworth* v. *Holt* (4) and other cases would apply, and the claims of justice would be found superior to any difficulties arising out of technical rules respecting the mode in which corporations are required to sue." That I take to be the correct law on the subject.

(1) 2 Hare, 461.
(2) 1 Ph. 790.
(3) 2 Hare, 491.
(4) 4 My. & C. 619, 635.

It remains to consider what are those exceptional cases in which, for the due attainment of justice, such a suit should be allowed. We are all familiar with one large class of cases which are certainly the first exception to the rule. They are cases in which an individual corporator sues the corporation to prevent the corporation either commencing or continuing the doing of something which is beyond the powers of the corporation. Such a bill, indeed, may be maintained by a single corporator, not suing on behalf of himself and of others, as was settled in the House of Lords in a case of *Simpson* v. *Westminster Palace Hotel Company* (1). If the subject matter of the suit is an agreement between the corporation acting by its directors or managers and some other corporation or some other person strangers to the corporation, it is quite proper and quite usual to make that other corporation or person a Defendant to the suit, because that other corporation or person has an interest, and a great interest, in arguing the question and having it decided, once for all, whether the agreement in question is really within the powers or without the powers of the corporation of which the corporator is a member. So that in these cases you must always bring before the Court the other corporation.

The cases are so numerous on this subject, that one ought not perhaps to refer to them. But I may mention a few of them. There is, first, the well-known case of *Hare* v. *London and North-Western Railway Company* (2); there is the case of *Simpson* v. *Denison* (3); there is a case of *Beman* v. *Rufford* (4); and a vast number of cases as regards agreements between railway companies which have been held to be *ultrà vires*. When you have got the second corporation or person a party to the suit, it may happen that, in addition to the relief that you are entitled to as regards the first, you are entitled to have relief against the second for something that has been done under the *ultrà vires* agreement. You may be entitled to have money paid back which has been paid under the *ultrà vires* agreement, as in the case of *Salomons* v. *Laing* (5), and you may be entitled to have property returned or other acts done. If the detainer or holder of the money or property, that is, the

(1) 8 H. L. C. 712.
(2) 2 J. & H. 80.
(3) 10 Hare, 51.
(4) 1 Sim. (N.S.) 550.
(5) 12 Beav. 377.

M. R. 1875 RUSSELL v. WAKEFIELD WATERWORKS COMPANY.

second corporation or other person, is already a party, and a necessary party, to the suit, it would be indeed a lame and halting conclusion if the Court were to say it could do justice in a suit so framed by ordering the money to be returned or the property restored. It is a necessary incident to the first part of the relief which can be obtained by individual corporators, and will do complete justice on each side, and that has always been the practice of the Court. Therefore, in a case so framed there is no objection to a suit by an individual corporator to recover from another corporator, or from any other persons being strangers to this corporation, the money or property so improperly obtained. But that is not the only case. Any other case in which the claims of justice require it is within the exception.

Another instance occurred in the case of *Atwool* v. *Merryweather* (1), in which the corporation was controlled by the evil-doer, and would not allow its name to be used as Plaintiff in the suit. It was said that justice required that the majority of the corporators should not appropriate to themselves the property of the minority, and then use their own votes at the general meeting of the corporation to prevent their being sued by the corporation, and consequently in a case of that kind the corporators who form part of the minority might file a bill on their own behalf to get back the property or money so illegally appropriated. It is not necessary that the corporation should absolutely refuse by vote at the general meeting, if it can be shewn either that the wrong-doer had command of the majority of the votes, so that it would be absurd to call the meeting; or if it can be shewn that there has been a general meeting substantially approving of what has been done; or if it can be shewn from the acts of the corporation as a corporation, distinguished from the mere acts of the directors of it, that they have approved of what has been done, and have allowed a long time to elapse without interfering, so that they do not intend and are not willing to sue. In all those cases the same doctrine applies, and the individual corporator may maintain the suit. As I have said before, the rule is a general one, but it does not apply to a case where the interests of justice require the rule to be dispensed with. I do not intend by the observations I have made in any way to restrain

(1) Law Rep. 5 Eq. 464, n.

M. R. 1875 RUSSELL v. WAKEFIELD WATERWORKS COMPANY.

the generality of the terms made use of by the learned Judge who decided the case of *Foss* v. *Harbottle* (1). Therefore I cannot help seeing it is quite possible so to amend this bill as to get rid of the difficulty which now exists, and I think that on this part of the case I should give leave to amend. Of course, in allowing the demurrer, I allow it in the usual form.

Solicitor for the Plaintiff: Mr. *Horace Philbrick.*

Solicitors for the Defendants: Messrs. *Singleton & Tattershall;* Messrs. *Torr & Co.*

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## ATTORNEY-GENERAL *v.* WEBSTER.

M. R. 1875 *June* 4.

[1871 A. 65.]

*Parish Property—Charitable Trust.*

A trust of property in favour of a parish or the parishioners of a parish for ever can only be upheld on the ground of its being a charitable trust.

In 1585 property was conveyed to two persons upon a secret trust for a *London* parish. The income of the property was afterwards received by the churchwardens and applied to charitable purposes:—

*Held*, that the property was subject to a charitable trust.

THIS was an *ex officio* information by the Attorney-General for the purpose, 1, of having it declared that certain properties known as the *Parish Estates of St. Stephen's, Coleman Street*, in the city of *London*, were held upon charitable trusts, and not (according to a claim set up as to part thereof) simply the private property of the parishioners; 2, of having the specific trusts affecting the several properties distinguished; and, 3, of establishing a scheme for the regulation of the charities.

The Defendants were the churchwardens of *St. Stephen's, Coleman Street*, and the feoffees in trust of the said estates appointed by an indenture dated the 3rd of April, 1856.

The instruments by which the several properties were originally devoted to the purposes of the parish had all been lost; and in later times the practice had prevailed of conveying the whole of the estates from time to time from one set of feoffees or trustees

(1) 2 Hare, 461.

M. R. 1875 ATTORNEY-GENERAL v. WEBSTER.

to another upon trusts described as "for the use and benefit of the parishioners of the said parish for ever." Part of the property, however, appeared to have been specifically given or devised for the use or relief of the poor; as to the other part (to which the present report relates), the main question in the cause arose.

The churchwardens' accounts were preserved from the year 1486, with the exception of a gap from 1507 to 1585; and it thereby appeared that the rents and profits of the estates in question were received by the churchwardens and applied for the repairs, ornaments, and services of the church, the sexton's salary, and churchwardens' expenses, to which were added, until the period of the Reformation (but not afterwards), certain payments for obits. Among the documents in the possession of the churchwardens was a copy of a will devising part of the estate in question to the vicar, churchwardens, and parishioners of *St. Stephen's*, upon condition that out of the issues and profits of the estates they should hold and observe an obit and anniversary of the testator and his wife, and purchase a wax light to burn at Easter time about the tomb in manner long accustomed in the church, and to expend the residue in repairs and ornaments of the church, and in repairs and maintenance of the property devised. The information charged that this document might be taken as an example of the original instruments of foundation of these properties.

In or about the year 1585 the church properties in question appeared to have been exposed, like other church or parish estates (on account of the intermixture in some cases of superstitious uses with the original trusts), to claims on the part of "concealers," that is, of persons who having obtained grants from the Crown of all "concealed" or forfeited lands within a parish or other area proceeded to bring actions against and otherwise harass the persons or bodies holding lands upon charitable trusts connected with church purposes.

By letters patent under the Great Seal, dated at *Gorhamburge*, the 24th of July, 1570 (12th Eliz.), Her Majesty promised to grant to Sir *Thomas Wentworth*, Knight, Lord *Wentworth*, his heirs and assigns, or to such other person or persons as the said Lord *Wentworth*, his heirs or executors, should nominate or appoint, all and so many of all such Her Majesty's lordships, manors, and

other hereditaments and advowsons to the same belonging within the realm of *England* and the dominions of the same as then or at that time were concealed, subtracted, or unjustly detained from Her Majesty or her progenitors which ought to have come to her hands or the hands of her progenitors by reason and force of any Act of Parliament, statute, or law of the realm of *England*, or by reason of any forfeiture, attainder, outlawry, reversion, remainder, or escheat, and which by the said *Thomas* Lord *Wentworth*, his heirs, executors, or administrators, were revealed and found out by survey, inquisition, information, or otherwise, as should amount to the clear yearly value of £200, and not above, over and besides all charges and reprises, to have, hold, and enjoy the said lordships, and manors, and advowsons, and hereditaments, and other the premises with their appurtenances, to the aforesaid *Thomas* Lord *Wentworth*, his heirs and assigns, for ever, or to such person or persons, their heirs and assigns, whom the said *Thomas* Lord *Wentworth*, his heirs or executors, should nominate and appoint.

By letters patent dated the 2nd of August, 1585 (27th Eliz.), after reciting the before-mentioned letters patent dated the 24th of July, 1570, Her Majesty, in part fulfilment of the promise made by her of the gift and grant to the said *Thomas* Lord *Wentworth*, and on the humble petition of *Henry* Lord *Wentworth*, son and heir of the said *Thomas* Lord *Wentworth* then deceased, gave and granted to *Theophilus Adams*, of *London*, gentleman, and *Thomas Butler*, of *London*, gentleman, "all our messuages, gardens, tenements, and hereditaments, with the appurtenances, in the parish of *St. Stephen's*, in *Coleman Street*, *London*, heretofore being, given, assigned, limited, bequeathed, or used for the perpetual maintenance of a chaplain or priest, or other superstitious uses, in the church of *St. Stephen's*;" and also all woods and trees, and all and singular messuages, buildings, yards, easements, rights, and liberties to the said premises belonging as fully as the same by any abbot, prior, priest, chaplain, chanter, incumbent, master, governor, feoffee, or commonalty of the monasteries, priories, colleges, chantries, guilds, hospitals, lamps, luminaries, obits, anniversaries, or such like things aforesaid, had at any time been held or enjoyed, as fully and freely and in as ample a manner and form as the

M. R. 1875 ATTORNEY-GENERAL v. WEBSTER.

same premises came, or ought to have come, to the Queen's hands, or the hands of the late King *Henry* the Eighth, and *Edward* the Sixth, and Queen *Mary*, or of any of the Queen's late progenitors, by reason of any dissolution or suppression of the said monasteries, priories, guilds, hospitals, chantries, chapels, lamps, obits, luminaries, and anniversaries, or such like things, or by reason or force of any Act of Parliament, or by escheat, attainder, forfeiture, or any other lawful means then were or ought to be in her hands, and which said premises, with their appurtenances, were therein described as then extended in the whole, according to the several particulars thereof, at the clear yearly value of (beyond reprises) £82 15*s.* 3*d.*: To hold the same unto the said *Theophilus Adams* and *Thomas Butler*, and the heirs and assigns of the said *Theophilus Adams*, to the only and proper use and behoof of the said *T. Adams* and *T. Butler*, and the heirs and assigns of the said *T. Adams*, for ever: To hold of Her Majesty, her heirs and successors, as of the manor of *East Greenwich*, by fealty in common socage, and rendering out of and for the premises in the parish of *St. Stephen's*, in *Coleman Street*, the rent of 5*s.*, and also all accustomed rents.

By an indenture dated the 20th of November, 1585 (28th Eliz.), and made between the said *T. Adams* and *T. Butler* of the one part, and *William Daniell*, of *London*, Esquire, and *Edward Turfett*, of *London*, gentleman, of the other part, in consideration of £200 paid by the said *W. Daniell* and *E. Turfett*, the said *T. Adams* and *T. Butler* sold and enfeoffed to the said *W. Daniell* and *E. Turfett* the messuages or tenements and hereditaments therein particularly described, with the appurtenances, and all other messuages, gardens, tenements, and hereditaments in the parish of *St. Stephen, Coleman Street*, theretofore given, assigned, limited, devised, or used to the perpetual sustentation of a chaplain or priest, or other superstitious uses in the church of *St. Stephen*, which were granted by the said letters patent under the Great Seal of *England* of the 2nd of August, in the 27th year of *Elizabeth*, by the name of all the messuages, gardens, tenements, and hereditaments, with the appurtenances, in the parish of *St. Stephen, Coleman Street*, theretofore being, given, assigned, limited, bequeathed or used to the perpetual sustentation of the chaplain or

priest or other superstitious uses in the church of *St. Stephen* (except the messuage in the occupation of *William Daniell*, which had been conveyed to him, his heirs and assigns, by the said *T. Adams* and *T. Butler*), to hold the said hereditaments and premises unto the said *William Daniell* and *Edward Turfett*, their heirs and assigns for ever, to the only proper use and behoof of them the said *William Daniell* and *Edward Turfett*, their heirs and assigns, for ever, in as large and ample a manner and form as the said *T. Adams* and *T. Butler* had the same premises of the gift and grant of Her Majesty by the said letters patent, subject to the said rent of 5*s*.

It appeared from the accounts of the churchwardens that the sum of £200 mentioned in the last stated indenture was raised by a sale of a part, and levying in advance the rents of the remainder, of the parish church properties; and that the conveyance to *Daniell* and *Turfett* was "to the use of the parish, albeit no such use be in the deed of bargain and sale."

It appeared from the answer of the Defendants to the original information that, subsequently to the re-acquisition of the said property by the parish in 1585, there is no entry in the churchwardens' accounts of any payments or disbursements for priest's salary, or masses, or any other superstitious uses; but that the disbursements contained in the accounts were for general parochial purposes, including the salary of the sexton, the salary of one *Robert Brodgate* for cleaning the channel of the street and *Horse Alley* for one year, for ringing and repairing the bells, for repairs to the parish properties, for gravel for the causeway without *Moorgate* and paving the street in front of the church, for mending the pews, for emptying cesspools, and for expenditure in connection with the draining and repairing the church, for communion bread and wine, and for books of prayer and expenditure connected with the archdeacon's visitation.

It was stated in the answer of the Defendants to the amended information that, in addition to the various payments above mentioned, there appeared in the accounts the following matters, being expenses connected with the several parochial purposes of the parish, including expenses in connection with the parish church, (that is to say), "for removing stable dung, for cleaning the channel

M. R. 1875 ATTORNEY-GENERAL v. WEBSTER.

in the street, for candles, for ringing at six o'clock in the morning and eight o'clock at night, for ringers on the day of Her Majesty's coronation, for amending and new-hanging the great bell, for the carriage of ordure out of the common privy or vault, for paving twenty yards of *Chymney Alley*, for laying loads of gravel on the causeway without *Moorgate*, for leather for fire-buckets for the church." In the accounts for the year ending the 24th of June, 1588, there were items of money paid for other parish purposes, and in the accounts for the year 1589 there was a payment for two dozen of new leather buckets, bought for the use of the parish by virtue of a precept from the Lord Mayor, and for ladders for the use of the parish also by command of the Lord Mayor, and for paving the street.

In 1858 the parish feoffees were advised by counsel that the property in question was held for charitable purposes, and could not be leased without the sanction of the Charity Commissioners. In 1870 the Charity Commissioners applied for accounts of the parish estates, and upon the Defendants refusing to render such accounts this information was filed.

The Defendants insisted that the property in question was acquired free from any trust or use of a charitable nature, and was in fact granted for the use only of the parish and the parishioners for the time being, and to be used and applied for general parochial purposes. They also submitted that the churchwardens of the parish were a corporation for the purpose of receiving and taking moneys, legacies, and property, for the benefit of the church.

The *Attorney-General* (Sir *R. Baggallay*), and Mr. *Vaughan Hawkins*, for the information:—

A grant of property for a parish or the benefit of a parish is a charitable gift: *Attorney-General* v. *Lord Hotham* (1); *Attorney-General* v. *Vivian* (2). If it be not charitable, the gift is bad under 23 Hen. 8, c. 10; *Porter's Case* (3). It is suggested that the churchwardens of a *London* parish are a corporation, and can receive and hold property for the use of the church; but in this

(1) T. & R. 209. (2) 1 Russ. 226.
(3) 1 Rep. 16 b.

case the property is not vested in the churchwardens, but in feoffees.

Mr. *Chitty*, Q.C., and Mr. *Everitt*, for the Defendants, submitted that property could be held for the use of the parishioners generally, and this had been so decided in the case of advowsons: *Edenborough* v. *Archbishop of Canterbury* (1).

Mr. *Hawkins*, in answer to a question of the Court, stated that he did not press for costs against the Defendants personally.

SIR G. JESSEL, M.R.:—

I do not entertain the slightest doubt either as to the law of the case, or as to what the Court ought to do with it.

The information is filed alleging that certain houses and lands within the parish of *St. Stephen's, Coleman Street*, in the city of *London*, are devoted to charitable purposes. The history of them may be very shortly stated. In ancient times these houses and lands were given by various persons to feoffees upon trusts, which, as the law then stood, were undoubtedly charitable. Religion having changed in this country, certain statutes were passed avoiding these charitable purposes so far as by reason of the change of religion of the country they were then accounted superstitious, and by subsequent statutes the property of which the uses or charitable trusts had been so avoided was vested in the Crown without office found. With the view of discovering the concealed trusts, as some of them were, rewards were given to persons who discovered to the Crown the existence of these trusts, the object being to encourage people to come forward as informers and enable the Crown to become possessed of the property. The bulk of these uses certainly, if not all of them, was avoided by these statutes, and in strictness I have no doubt that with regard to the great bulk of these houses and lands, if not the whole, they became vested in the Crown under some one or other of the statutes to which I have referred.

In the year 1585 this arrangement appears to have taken place: It appears by a memorandum in the parish books that the owners

(1) 2 Russ. 93.

M. R.
1875
ATTORNEY-GENERAL v. WEBSTER.

of the property (the feoffees held it in a sense in trust for the parish), namely, the parish charities, made an arrangement with Lord *Wentworth* (who had obtained a grant from the Crown up to £200 a year of this kind of property), by which they bought from persons, who obviously on the face of the instrument were trustees for him, the parish property, and they paid for it in this way: they sold two of the houses, and they took beforehand rents of some of the tenants of the others, so as to make up the total amount given for the re-purchase of the property. The amount given was not the value, nor anything like the value, of the property; but it satisfied Lord *Wentworth*, and accordingly his nominees or trustees conveyed the land to two gentlemen named *Daniell* and *Turfett*. The property having been paid for in the way I have mentioned, out of the property itself, in strict law, I suppose, it would belong to *Daniell* and *Turfett*, if no other claimant could have made any title to it. The uses being all substantially avoided, the Crown was the owner. Lord *Wentworth* became owner from the Crown, and Lord *Wentworth* or his trustees could have made a good title to anybody for any amount they chose to accept for it, and in form that was what was adopted. But in fact that was not intended either by *Daniell* and *Turfett*, or by anybody else. What the parish authorities intended to do was to buy the land back by the sacrifice of a portion of it; to devote the remainder to similar charitable purposes to which it had been previously devoted, but excepting the superstitious uses. What they did, therefore, was to take a conveyance to *Daniell* and *Turfett* absolutely, but with a trust (not expressed in the deed) in the words which appear in the account, "to the use of the said parish, albeit no such use be in the said deed of bargain and sale to them of the said lands and tenements made expressed;" so that the arrangement was that *Daniell* and *Turfett* should hold them to the use of the parish. That occurred in 1585. Now what became of them? We find by the answers of the Defendants that the income of this property has been applied in this way:—[His Honour read the statements set out above.] That is, that the rents have been used ever since the year 1585 for "charitable" purposes; that is, for "charitable" purposes consistently with the definition which the word "charitable" receives in this Court.

That being so, we have a case where property was purchased for the benefit of a parish, and which has been used now for nearly three centuries for charitable purposes; and that being so, I have not the slightest doubt or hesitation in saying that if there had been no authority whatever on the subject, there could be no question that this was properly held for charitable purposes. But there is authority distinctly in point, the case of *Attorney-General* v. *Lord Hotham* (1), which is entirely undistinguishable. In that case the conveyance was "for the use and benefit of the said parish"—the very same words we have here—and the information stated "that the rents and profits of the said lands had from time immemorial been received by the churchwardens and overseers of the said parish, and applied in the repairs of the church, in the maintenance of the poor, and in other parochial purposes in aid of the rates." Therefore, if you want authority, there is express authority; but I say none was wanted, because it is impossible for the Defendants to make out how you could have a valid trust for the benefit of the parish or for the parishioners for ever without its being charitable; and no suggestion has been made except a reference to that anomalous line of cases in which it has been said that an advowson can be so held.

Now it must be remembered that where the advowson is so held the parishioners can get no individual profit; all they can get is the right to nominate their own rector or vicar—they get no personal benefit: and I think it is possible to reconcile that line of cases on this theory, that it is a mere mode of selecting the charity trustee, because the man who performs divine service and ministers to the spiritual wants of the parish is in a sense, and in a grand sense, a trustee for the parish. The parishioners, having the perpetual right of nomination, have only the right of choosing the parson of the parish, which is, no doubt, from its nature, a very important thing. At the same time I admit at once it is an anomaly, and it is very difficult to find out how such a right of nomination could be properly vested in the parishioners from time to time to elect at their own will and pleasure. However, it is so established. That line of cases has, in my opinion, no bearing whatever on the case I have now to decide.

(1) T. & R. 209.

M. R. 1875 ATTORNEY-GENERAL v. WEBSTER.

His Honour then discussed the question how the costs of the suit were to be borne, and held that, having regard to the advice received by the feoffees in 1858, the Defendants were not entitled to receive any costs, and that the costs of the Attorney-General must be provided for out of the trust estate.

Solicitors: Mr. *Clabon;* Mr. *C. Mills Roche.*

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M. R. 1875 *June* 8, 9.

## PEARCE *v.* WATTS.

[1873 P. 168.]

*Vendor and Purchaser—Specific Performance—Reservation of "Necessary Land for making Railway"—Defence not raised by Demurrer—Costs.*

Contract for the sale of an estate, vendor reserving "the necessary land for making a railway" through the estate to *P.* In a suit by the purchaser for specific performance:—

*Held*, that the reservation was void for uncertainty, and that the contract could not be enforced:

*Held*, also, that, though the defence was raised by answer and not by demurrer, the bill must be dismissed with costs.

THE Defendant, *T. Watts*, had entered into an agreement with the Plaintiff for the sale to him of an estate with the following reservation:—"*T. Watts* reserves the necessary land for making a railway through the estate to *Prince Town*."

The Defendant having refused to complete, the Plaintiff filed his bill for specific performance. The Defendant put in an answer, the principal defences being that the contract was void for uncertainty, and that the Defendant at the time when he entered into it was of unsound mind.

Mr. *Southgate*, Q.C., and Mr. *Bevir*, for the Plaintiff:—

The contract for the sale of the estate is one which this Court will enforce, and the reservation contained in it does not render it void for uncertainty. The Court can ascertain what land is necessary for making the railway: *Bedford and Cambridge Railway Company* v. *Stanley* (1). In *Sanderson* v. *Cockermouth and Work-*

(1) 2 J. & H. 746.

*ington Railway Company* (1) there was a contract for sale with the following reservation:—"Subject to the making such roads, ways, and slips for cattle as might be necessary." In that case the Court directed a reference to ascertain what was necessary or proper.

It may be said that the contract cannot be carried out by a conveyance, but, as what the vendor contemplated was a compulsory purchase by the railway company, there might be a covenant that the purchase-money of any land taken by the company should be paid to the vendor: *Jenkins* v. *Green* (2); *Lord J. Stuart* v. *London and North-Western Railway Company* (3); *Liddy* v. *Kennedy* (4).

If, however, the Court should consider that the contract cannot be specifically performed, and that the bill must be dismissed, at any rate, as the Defendant might have raised the defence by demurrer, the Plaintiff ought not to pay the full costs up to the hearing.

Mr. *Chitty*, Q.C., and Mr. *Simmonds*, for the Defendant, were not called on.

SIR G. JESSEL, M.R.:—

I am of opinion that this contract cannot be enforced. It may be said that the Court takes a strict view of these contracts; but if a Plaintiff seeks specific performance, he must take the contract as it is made, and it must be construed strictly.

The present contract is one which cannot be carried out by conveyance; and that being so, I do not see how the Court can alter it and make a new contract which can be carried out by conveyance. By the contract the vendor agrees to sell certain land, but "reserves the necessary land for making a railway through the estate to *Prince Town*." If the conveyance were executed in this form, it is obvious, according to the present law, the whole land would pass to the purchaser, the reservation being void for uncertainty. But this is not the intention of the parties, for the vendor intended to reserve a substantial part of the estate.

(1) 11 Beav. 497; 2 H. & Tw. 327.
(2) 27 Beav. 437. 5 Jur. N.S. 305
(3) 1 D. M. & G. 721.
(4) Law Rep. 5 H. L. 134.

M. R. 1875 PEARCE v. WATTS.

The contract does not shew what that is. I neither know what is the amount of land necessary for a railway, nor what line the railway is to take, nor anything about it, and, therefore, I cannot enforce specific performance of the contract. It is urged on the part of the Plaintiff that the Defendant might have demurred, and not having done so, is only entitled to such costs as he would have had in case he had demurred, and not to have the costs of the whole proceedings paid by the Plaintiff. It seems to me, however, that the same principle ought to apply to a suit in this Court as to an action at common law. In an action at law a Defendant may object to the form of the declaration although all the witnesses are summoned, and if the objection be sustained, may sign judgment and have the whole of the costs. This ought to be the rule here, and in fact was held to be the rule by the Lords Justices in the recent case of *Bush* v. *Trowbridge Waterworks Company* (1). The bill must be dismissed with costs.

Solicitors for the Plaintiff: Messrs. *Coode, Kingdon, & Cotton,* agents for Mr. *E. Chilcott, Tavistock.*

Solicitor for the Defendant: Mr. *S. B. Somerville,* agent for Messrs. *W. & E. P. Burd, Okehampton.*

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M. R. 1875 June 9.

## HACKETT *v.* BAISS.

[1875 H. 110.]

*Ancient Lights—Injunction—Angle of* 45°.

Where a building was being erected in a somewhat narrow street in the City of *London*, and had already reached a height which would subtend an angle of 45° at the foot of the ancient lights of the Plaintiff's houses on the opposite side of the street :—

*Held*, that the Plaintiff was entitled to an injunction restraining the raising the new building to a greater height.

THIS was a suit to restrain the Defendants from building a warehouse of such a height as to interfere with the access of light and air to the Plaintiff's premises.

(1) Law Rep. 10 Ch. 459.

The Plaintiff in this case was the owner of certain messuages in *Jewry Street* in the City of *London*, the owners and occupiers of which had had uninterrupted enjoyment of light and air for above twenty years. In two of the houses the Plaintiff carried on business as a wholesale furniture manufacturer, with a shop and shop-front, and show-rooms upstairs. The other houses were let for business purposes. The greatest width of the street was 38 ft. 6 in., and at some parts it was only 34 feet wide. The foot of the Plaintiff's ground-floor windows was 5 feet above the ground, the centre of the windows 3 feet higher; the average height of the bottoms of his first-floor windows was 16 feet above the ground, and the average height of his houses was 45 feet. The road on that side of the street was one foot higher than on the opposite side.

The Defendants were erecting a warehouse opposite to the Plaintiff's premises on the site of some old buildings, part of which only subtended an angle of 38°, and other part an angle of 27° above the horizon at the centre point of the ground-floor windows of the Plaintiff's houses. The Defendants desired to build their warehouse 52 feet high, and had carried it up to the height of 46 feet when the bill was filed.

The bill prayed that the Defendants, their agents, servants, and workmen, might be restrained by injunction until the hearing of the cause, and thenceforth perpetually, from further raising the said erection, or permitting it to remain at a greater height than the buildings which formerly stood on the same site, or at such height as might obstruct or diminish such access or use of light to the Plaintiff's messuages as was enjoyed before the old buildings were pulled down.

An interim injunction had been obtained, and the cause now came on for hearing, with the usual scientific evidence on both sides.

It appeared that the height to which the building was already raised subtended an angle of rather more than 45° at the foot of the Plaintiff's ancient lights.

Mr. *Fischer*, Q.C., and Mr. *Henderson*, for the Plaintiff, contended that he was entitled to an injunction restraining any further elevation of the walls of the new building, but they did not ask for a mandatory injunction in order that the Defendants might be

M. R. 1875

HACKETT v. BAISS.

compelled to pull down their building to the height of 44 feet, which would preserve the access of light at the angle of 45°.

Mr. *Chitty*, Q.C., and Mr. *Tyssen*, for the Defendants:—

There is no reported case in which the right to light has been carried to the extent contended for here. The nearest case is *Yates* v. *Jack* (1), where the distance was 31 feet and the height of the proposed building 67 feet.

The *Prescription Act* (2 & 3 Will. 4, c. 71) does not give an owner any further right than the common law. It has not altered the nature of the easement, but only its mode of proof. It was supposed for some time that the Act gave an indefeasible right to every inch of sky, but that was held to be erroneous in *Kelk* v. *Pearson* (2), and again in *City of London Brewery Company* v. *Tennant* (3). The Lord Justice *James* there says: "The extent of the right of an owner of ancient lights is to prevent his neighbour from building so as to obstruct the access of sufficient light and air to such an extent as to render the house substantially less comfortable and enjoyable, that is to say, that he is entitled to sufficient light, according to the ordinary notions of mankind, for the comfortable use and enjoyment of that house as a dwelling-house, if it were a dwelling-house, or for the beneficial use and occupation of the house, if it were a warehouse, a shop, or other place of business."

On this principle an injunction was refused in *Clarke* v. *Clark* (4), although the sunshine was reduced in winter from 2½ hrs. to 40′; and in *Robson* v. *Whittingham* (5), where the distance was 15 feet, the building to the west, as here, the old buildings in part 30 feet high, and in part 14 feet, and the new buildings 36 feet throughout. There was also evidence there of the gas having to be lighted earlier, and a table having to be moved. The case was much stronger in favour of the Plaintiff than the present case. An injunction was also refused in *Durell* v. *Pritchard* (6), where the distance was 10 feet, the old buildings 13 ft. 6 in. high, and the new ones 20 feet, and the building to the west.

(1) Law Rep. 1 Ch. 295.
(2) Ibid. 6 Ch. 809.
(3) Ibid. 9 Ch. 212, 216.
(4) Law Rep. 1 Ch. 16.
(5) Ibid. 442.
(6) Ibid. 244.

Even if we do interfere to some slight extent with the Plaintiff's light and air, we submit that the damage is so trivial that the Court will not grant an injunction, but only inquire into the amount of damage in accordance with the principles laid down by your Honour in *Aynsley* v. *Glover* (1).

SIR G. JESSEL, M.R. :—

I have no doubt in this case as to what I ought to do, having regard to the law of the Court. In the first place, the building of which complaint is made is not completed, and although some complaint is made as regards the building up to its present height, yet, as it is only a question of 1 foot or 1½ feet between the present height of 46 feet and the height to which the building ought to go in order to preserve the access of light at an angle of 45°, which would probably be 44 feet, or thereabouts, the counsel for the Plaintiff did not ask me to grant a mandatory injunction in order to make the Defendants pull down to that difference. Therefore, I am entitled to treat this question as if I were deciding the question as to a building leaving the access of light still to the Defendant's houses at an angle not greater than 45°. Speaking of that, I do not think with a completed building that the mere fact of its being a few inches too high would have induced the Court to grant a mandatory injunction, even if the Plaintiff's counsel had not waived it.

The real question I have to decide is this: In a street a good deal narrower than ordinary streets, not being more than 38 ft. 6 in. at any part across, and at other parts only 34 feet, is a building owner entitled to erect a building to a height which will obstruct the access of light below the 45° angle ? I say that, as a general rule, he is not. In cases of this kind, positive evidence being unobtainable, because the building is not erected, you must go upon theory, and that theory of course must be the opinion of skilled persons—persons who have paid attention to the effect of buildings on light. But on this point the Court is not left to guess or to arrive at an arbitrary conclusion upon the evidence of witnesses, because, in the first place, the point has been considered by the Legislature, and after considering the result of

(1) Law Rep. 18 Eq. 544, 554.

M. R. 1875 HACKETT v. BAISS.

professional opinions, the Legislature has adopted the angle of 45° as the proper angle below which the incidence of light ought not to be permitted to fall in the case of buildings on the opposite side of an ordinary street; and that view has been sanctioned by the Court whose decisions are binding upon me, even if I differed from them, which I do not. I refer to the case of *City of London Brewery Company* v. *Tennant* (1), where the judgment contains these words: "Further, with regard to the forty-five degrees, there is no positive rule of law upon that subject; the circumstance that forty-five degrees are left unobstructed being merely an element in the question of fact, whether the access of light is unduly interfered with; but undoubtedly there is ground for saying that if the Legislature, when making general regulations as to buildings, considered that when new buildings are erected, the light sufficient for the comfortable occupation of them will, as a general rule, be obtained if the buildings to be erected opposite to them have not a greater angular elevation than forty-five degrees, the fact that forty-five degrees of sky are left unobstructed may, under ordinary circumstances, be considered *primâ facie* evidence that there is not likely to be material injury."

So that, on being satisfied that 45° are unobstructed, I ought, *primâ facie*, to come to that conclusion, unless there is something special in the case.

Now, what is special in this case is in favour of the Plaintiff. In the first place, as I have said, the street is rather narrower than it ought to be. The legislative rule applies to a street of the ordinary width. In the next place, there is some positive evidence that the present height of 46 feet, a little over the 45°, has interfered with the access of light not to an inconsiderable extent, and has actually caused personal inconvenience to one of the occupiers of the houses. I do not say that that alone would be conclusive. I cordially assent, if my assent were necessary, which it is not, to the remarks made by Lord *Cranworth* in the case of *Yates* v. *Jack* (2). I think it is no answer to say, because for sampling in some businesses it is better that the direct rays of the sun should not enter into the room, that therefore you may deprive a man of the blessing and comfort of the entry of the

(1) Law Rep. 9 Ch. 220. (2) Law Rep. 1 Ch. 295.

direct rays of the sun. If he does not like the sun entering when he is going to sample, he can pull down his blind, or otherwise regulate the access of light. There are other times of the day when his room would be more cheerful, more comfortable, and more enjoyable with the sunshine, especially in a city like *London*, where we do not see quite so much as we should like of the direct rays of the sun. That is no answer at all. It is not conclusive upon the point, and, so far as it goes, is in favour of the Plaintiff. That being so, I shall grant an injunction.

It is a very serious matter to decide what the terms of it ought to be. I have sent for the order in *Yates* v. *Jack* (1), which I have read. It is not necessary that the whole subject-matter in dispute should be fought out in a most inconvenient and disagreeable form upon a formal motion to commit the Defendants for breach of the injunction. Nothing, in my opinion, can be more undesirable; but, at the same time, it is impossible for the Court to say beforehand what kind of building would obstruct the light. The Defendants may wish to alter their plans, and if they do so wish, the Court, *à priori*, cannot say whether the plans when altered will or will not be objectionable to the Plaintiff; therefore in that case the Court has no alternative.

It has, therefore, been my habit to ask the Defendant what form of injunction he prefers; and I believe in every case the answer has been the same as Mr. *Chitty* has given to day, namely, that he prefers an order which tells him exactly what he is not to do. I will grant an injunction to restrain the Defendants from erecting the new building at a greater height than 46 feet from the pavement or base line. This, however, is not to prevent the Defendants from making a sloping roof of a greater height, so long as the angle of incidence of light over the roof to the centre of the ground-floor windows of the Plaintiff's houses does not exceed 45°.

Solicitors for the Plaintiff: Messrs. *Glynes & Co.*
Solicitors for the Defendants: Messrs. *Nicholson, Nicol, & Co.*

(1) Law Rep. 1 Ch. 295.

M. R.
1875
June 11.

## SMITH *v.* SMITH.

[1875 S. 83.]

*Ancient Lights—Obscuration—Mandatory Injunction—Damages under Lord Cairns' Act* (21 & 22 *Vict. c.* 27)—*Delay and Acquiescence.*

In a suit by the owner and occupier of a house and workshop complaining of the obscuration of his ancient lights by the Defendant raising a low party wall distant only eight feet from his windows to a height of twenty-six feet:—

*Held*, that as the Plaintiff had not lost his right to relief by delay or acquiescence, he was entitled to a mandatory injunction for the removal of the additional building.

The circumstances under which the Court will grant a mandatory injunction instead of damages under *Lord Cairns' Act* (21 & 22 Vict. c. 27) considered.

THE object of this suit was to obtain a mandatory injunction for the removal of a building which, as the Plaintiff alleged, interfered with the access of light and air to his house.

The Plaintiff's house, of which he was owner and occupier, and where he carried on the business of a cabinet-maker and upholsterer, consisted of a house, workshop, and back yard. The kitchen and scullery were built out from the house on part of the back yard, and over these was a story consisting of two rooms, one of which was the workshop.

The Defendant's house adjoined the Plaintiff's, and their respective back yards were separated by a party wall, the height of which was 9 ft. 6 in. before the erection complained of. The windows of that part of the Plaintiff's house which was built out on his back yard faced the party wall, and were distant from it about eight feet. The Plaintiff claimed to have had the enjoyment of light and air through the windows of his house since 1829. In February, 1875, the Defendant began to pull down part of his outbuildings. On the 1st of March the Plaintiff first observed that he was removing the roof from his kitchen. On the 11th of March the Plaintiff first observed that he was raising the party wall, and wrote a letter of complaint. On the 15th of March his solicitor wrote a letter to the Defendant, requiring him to take down the

wall, which had been raised to a considerable height. On the 16th of March a formal notice to the same effect was served on the Defendant. The Defendant, however, still continued his building, and on the 17th of March it was raised to the height of 26 ft. 8 in.

The Plaintiff thereupon, on the 19th of March, filed his bill, alleging that the Defendant's building had darkened his rooms, especially the kitchen and scullery, and the workshop, which was rendered useless for the work of a cabinet-maker and upholsterer, and praying that the Defendant might be restrained by injunction from erecting or permitting to remain erected upon, along, or adjoining the said party wall, any erection of greater height than the party wall stood at the commencement of the building; and also praying that damages might be awarded.

The Plaintiff adduced evidence to shew that the rooms facing the party wall were so darkened by the Defendant's erection that they could scarcely be used except by gaslight; that the workshop was rendered almost useless for its purpose; that the house had become almost uninhabitable; that the health of some of the inmates had been affected; and that the Plaintiff's wife and children had been obliged to leave.

An interim order had been obtained in the terms of the prayer of the bill, but omitting the mandatory order, without prejudice to the Defendant so far completing his building as to make it wind and weather proof, but no further.

The cause now came on for hearing, and the main defence on the part of the Defendant was that the Plaintiff's right was barred by delay and acquiescence.

Mr. *Chitty*, Q.C., and Mr. *Millar*, for the Plaintiff.

Mr. *Bagshawe*, Q.C., and Mr. *Whitehorne*, for the Defendant:—

We do not deny the obscuration of the Defendant's light; the only question is whether this is a case in which the Court will grant a mandatory injunction. Assuming that a case has been made out in which, before *Lord Cairns' Act*, the Court would have granted such an injunction, we submit that the Plaintiff's delay in asserting his claims is a bar to his rights. When a man stands by and allows another to spend a large sum of money on a building

M. R. 1875 SMITH v. SMITH.

which he must know will interfere with the access of light and air, the Court will not order the building to be taken down. The remedy is an extraordinary one, and is a form of relief only granted under special circumstances, which do not exist in the present case. Since *Lord Cairns' Act*, in cases where it would be a real injury to the Defendant if a mandatory injunction were granted, the Court will award damages instead. Here the Plaintiff did not at once commence proceedings, but allowed the building to proceed and to be carried to a great height before proceedings were taken. We submit, therefore, that a mandatory injunction should be refused, and the cause referred back to Chambers for damages to be assessed.

[They referred to *Jessel* v. *Chaplin* (1); *City of London Brewery Company* v. *Tennant* (2); *Isenberg* v. *East India House Estate Company* (3); *Curriers' Company* v. *Corbett* (4); *Aynsley* v. *Glover* (5).]

SIR G. JESSEL, M.R.:—

The present case has been argued on a single point. It was admitted that, looking to the circumstances of the case, the Court would have granted a mandatory injunction before *Lord Cairns' Act;* but it was contended that, having regard to the provisions of that Act, no such injunction ought to be granted, but that an inquiry as to damages should be directed.

I will first consider the case independently of the Act. The house was in the occupation of the Plaintiff, so that he was at once owner and occupier, a point considered of some importance in *Curriers' Company* v. *Corbett*. The injury was indisputable. The height of the old wall was nine feet, that of the new wall, which was exactly opposite to some of the Plaintiff's windows, was 26 ft. 8 in. According to the Plaintiff's statement, the light was almost entirely obscured, the rooms could scarcely be used except by gaslight, in addition to which he and his family had been injured in health, and his wife and daughter obliged to leave the house; while the room above the kitchen, which he used as a workshop, where a good light was required, had been rendered useless for that purpose.

(1) 2 Jur. (N.S.) 931.
(2) Law Rep. 9 Ch. 212.
(3) 3 D. J. & S. 263.
(4) 2 Dr. & Sm. 355; 11 Jur. (N.S.) 719.
(5) Law Rep. 18 Eq. 544.

Upon these facts I should have been surprised if it had been said that there was no case for an injunction. But it was said that there were circumstances which should induce the Court to stay its hand from issuing a mandatory injunction, and to give damages instead. It was said that there had been unwarrantable delay, amounting even to acquiescence, on the part of the Plaintiff; but the answer to this is clear: if he had thus lost the right to a mandatory injunction, he had also lost his right to damages. This is no reason why the Court should reduce the greater to the lesser remedy.

But I do not think that the Plaintiff has been guilty of any such delay. The subject has been recently considered by Vice-Chancellor *Hall* in the case of *Hogg* v. *Scott* (1), where the authorities are summed up and commented on, the result being that where a person had a legal right, it could be destroyed by his acquiescence, that is, if he stood by and allowed his neighbours to incur expenditure in doing what he knew would injure his property. One point for consideration, however, has always been, whether the man who did the act knew that he would do the injury. In the present case before me it is inconceivable that the Defendant did not know that he was injuring the Plaintiff most seriously. I must therefore assume, sitting as a jury, that he did know, and must have known, that he was going to do a wrong. This deprives the Defendant of one ground of defence.

But that is not all; in a case where acquiescence is alleged, the Plaintiff must use reasonable diligence. Here the Defendant began pulling down in February. On the 1st of March the Plaintiff, who had received no communication from the Defendant, discovered workmen taking the roof off the Defendant's kitchen.

Now the law, as illustrated by the case of *Attorney-General* v. *Leeds Corporation* (2), is that, where a man has a right to do a thing, and appears to be doing what he has a right to do, you must not assume that he is going to use his right for an unlawful purpose. In that case the corporation of *Leeds* were authorized to construct sewers, and the Court considered that it was not for other persons to conclude that they were going to use the sewers for an unlawful purpose. So, in this case, the Plaintiff was entitled to assume that the Defendant would not exercise his rights so as to injure him.

(1) Law Rep. 18 Eq. 444. (2) Law Rep. 5 Ch. 583.

M. R. 1875 SMITH v. SMITH.

On the 11th of March he first observed that the Defendant was going to build higher than the original height of the party wall. [His Honour then referred to the progress of the buildings, and to the communications addressed to the Defendant before the bill was filed, which was on the 19th of March, and considered that the Plaintiff would, under the circumstances, have been entitled to a mandatory injunction before *Lord Cairns' Act.*]

As to mandatory injunctions, their history is a curious one, and may account for some of the expressions used by the Judges in some of the cases cited. At one time it was supposed that the Court would not issue mandatory injunctions at all. At a more recent period, in cases of nuisance, a mandatory injunction was granted under the form of restraining the Defendant from continuing the nuisance. The Court seems to have thought that there was some wonderful virtue in that form, and that extra caution was to be exercised in granting it. To that proposition I can by no means assent. Every injunction requires to be granted with care and caution, and I do not know what is meant by extraordinary caution. Every Judge ought to exercise care, and it is not more needed in one case than in another.

In looking at the reason of the thing, there is not any pretence for such a distinction as was supposed to exist between this and other forms of injunction. If a man is gradually fouling a stream with sewage, the Court never has any hesitation in enjoining him. What difference could it make if instead of fouling it day by day he stopped it altogether? In granting a mandatory injunction, the Court did not mean that the man injured could not be compensated by damages, but that the case was one in which it was difficult to assess damages, and in which, if it were not granted, the Defendant would be allowed practically to deprive the Plaintiff of the enjoyment of his property if he would give him a price for it. Where, therefore, money could not adequately reinstate the person injured, the Court said, as in cases of specific performance, "We will put you in the same position as before the injury was done." When once the principle was established, why should it make any difference that the wrong-doer had done the wrong, or practically done it before the bill was filed? It could make no difference where the Plaintiff's right remained and had not been lost by delay or acquiescence.

Then what difference was introduced by *Lord Cairns' Act?* Before the Act it was a matter of right to obtain the injunction. By that Act the Court had a discretion to substitute damages where it thought proper. Now this discretion must be a judicial discretion, exercised according to something like a settled rule, and in such a way as to prevent the Defendant doing a wrongful act, and thinking that he could pay damages for it. Without laying down any absolute rule, in the first place it is of great importance to see if the Defendant knew he was doing wrong, and was taking his chance about being disturbed in doing it.

The next point for consideration is the materiality of the injury to the Plaintiff, as stated by *Bramwell*, B., in *Jessel* v. *Chaplin* (1), but that alone was not sufficient; all the circumstances of the case must be taken into consideration, not only the injury to the Plaintiff, but also the amount which has been laid out by the Defendant.

In the present case the injury was most serious to the Plaintiff, and he could not be compensated without the Defendant buying the house, while as regards the Defendant I am not satisfied that any considerable sum has been laid out upon his buildings. Again, the Plaintiff was occupier of the house, so that it was a personal injury to him. Taking all the circumstances together, therefore, I think I have no right to say that the Plaintiff is to give up the house and take pecuniary compensation for it, because it is more convenient to the Defendant. I shall grant a mandatory injunction in accordance with the terms of the prayer, and, following the order made in *Jessel* v. *Chaplin*, direct that it is not to operate for two months, and the Defendant to pay the costs of the suit.

[By consent there were inserted in the order provisions to the effect that in case of any dispute as to whether the Defendant had pulled down to a sufficient extent, the question should be referred to Mr. *Headley* (a surveyor), including the costs of the reference, and that the Defendant should pay £25 damages.]

Solicitors for the Plaintiff: Messrs. *Bell, Brodrick, & Gray,* agents for Mr. *T. C. M'Kenzie, Sunderland.*

Solicitors for the Defendant: Messrs. *Oliver & Bottrell.*

(1) 2 Jur. (N.S.) 931.

M. R.
1875
June 12, 21.

## *In re* PELOTAS COFFEE COMPANY.

### KARUTH'S CASE.

*Company—Winding-up—Contributory—Director—Qualification.*

Where the holding of a certain number of shares is a necessary qualification for a director, the mere acceptance of the office only involves an agreement to have the qualifying shares within a reasonable time after becoming director; and if a person accepting the office retracts the acceptance before the reasonable time for acquiring the shares has expired, and without having acted as director, he will not be fixed with the qualification in the event of the company being afterwards wound up.

*K.* subscribed the memorandum of association for ten shares; he also subscribed the articles, which provided that the qualification of a director should be the holding of fifty shares; that *K.* and two other persons named should be the first directors; and that the office of a director should be vacated if he ceased to hold the prescribed number of shares. The company was advertised to the public, and within three days after the publication of the prospectus, in which *K.*'s name appeared in the list of directors, *K.* gave notice in writing to the secretary of his withdrawing from the company on the ground of alleged misrepresentations made to him by the promoter as to its character and objects; and he never acted as a director, nor applied for shares, nor were any shares allotted to him. The company was ordered to be wound up, and on an application by the official liquidator to place *K.* on the list of contributories for fifty shares, including the ten shares for which he signed the memorandum:—

*Held*, under the circumstances, that *K.*'s name must be placed on the list for the ten shares only.

THIS was an adjourned summons that the name of *Frank Oscar Karuth* might be placed on the list of contributories of the *Pelotas Coffee Company, Limited*, now in liquidation, in respect of fifty shares, being the number which constituted the qualification of a director.

The company was incorporated in April, 1873, with a capital of £50,000, in 10,000 shares of £5 each. *Karuth* was one of the seven subscribers to the memorandum of association, and he subscribed it for ten shares. He also subscribed the articles of association, which were duly registered, and provided, that the qualification of a director should be the holding of not less than fifty shares in the capital of the company; that Sir *James Randoll*

*Mackenzie*, Bart., *Frank Oscar Karuth*, and *Julius Liebert*, should be the first directors of the company; and that the office of a director should be vacated if he ceased to hold the prescribed number of shares.

The company was first advertised to the public in the beginning of May, 1873, and on the third day after the publication of the prospectus, in which *Karuth's* name appeared as a member of the board of directors, *Karuth* gave notice in writing to the secretary of his withdrawing from any connection with the company, stating in the notice that his reason for withdrawing from the company was that he had discovered that *Julius Liebert*, the promoter, had grossly misrepresented to him its nature and objects; and he swore that he had no further communication on the subject of the company or its affairs until receipt of a notice from the official liquidator, dated the 11th of November, 1874, stating that an appointment had been made to settle the list of contributories. He never consented, he said, to the insertion of his name as a director in the prospectus, and his name was inserted in it without his knowledge or sanction; he never attended any board meetings, and he never applied for or agreed to take any shares, save the ten shares for which he signed the memorandum of association, and none were ever allotted to him. In fact, no allotment of shares ever took place, the company having been unsuccessful from its commencement. His signature did not appear in the directors' attendance book, and there was no evidence that he ever acted as a director.

Mr. *Fischer*, Q.C., and Mr. *Horton Smith*, for the official liquidator:—

It is submitted that *Karuth* is liable for the qualification number of shares, including the ten shares for which he signed the memorandum. *Green's Case* (1), which was very like the present case in many respects, is distinguishable on the ground that *Karuth* signed the articles, whereby he agreed to become a director. The other side will probably rely on the *Marquis of Abercorn's Case* (2), but in that case the taking of shares was not, as here, a necessary part of the qualification of a director, and it is inconsis-

(1) Law Rep. 18 Eq. 428. (2) 4 D. F. & J. 78.

M. R. 1875 — KARUTH'S CASE.

tent with the later cases. *Kincaid's Case* (1), which was followed by your Honour in *Forbes' Case* (2), *Levick's Case* (3), and *Sidney's Case* (4), are authorities in our favour. *Leeke's Case* (5) shews that a man who has agreed to become a director must be taken to have accepted the share-qualification.

[The MASTER OF THE ROLLS :—After *Brown's Case* (6), *Leeke's Case* can only be supported on the theory that Admiral *Leeke* had notice of shares being allotted, and acted as director after such notice.]

*Harward's Case* (7) shews that notice of allotment, in the case of a director, is not essential. In *Currie's Case* (8) the subscribers of the memorandum were fixed with the qualification, it being provided by the articles, which they had agreed to execute, that they should act as directors until others had been appointed, which event never happened. The principle is, that a man who has signed the articles cannot be heard to say that he has not had notice of their contents.

In *Stock's Case* (9) and *Forbes' Case* (10) the clause in the articles with reference to qualification did not apply to persons named as directors in the articles; but that is not the case here.

Mr. *P. B. Abraham*, for *Karuth*, was not called on.

SIR G. JESSEL, M.R. :—

The principle is clear, that no man can be a contributory of a company that is ordered to be wound up unless he be an actual shareholder, or have agreed to take shares in the company. It is admitted that Mr. *Karuth* was not an actual holder of fifty shares. A man who has agreed to take shares in a company may have agreed to take existing shares from a shareholder, or unallotted shares from the company. The question is, whether Mr. *Karuth* has agreed to take fifty unallotted shares from this company. The burden of

(1) Law Rep. 11 Eq. 192.
(2) Ibid. 19 Eq. 353.
(3) 40 L. J. (Ch.) 180. W.N. (1870) 27
(4) Law Rep. 13 Eq. 228.
(5) Ibid. 6 Ch. 469.
(6) Law Rep. 9 Ch. 102.
(7) Ibid. 13 Eq. 30.
(8) 3 D. J. & S. 367; S. C. 32 L. J. (Ch.) 421.
(9) 4 D. J. & S. 426. 10 Jur NS.
(10) Law Rep. 8 Ch. 768.

shewing that he has so agreed lies on the official liquidator, since Mr. *Karuth's* name is not on the register. The liquidator seeks to prove his case in this way: He produces the memorandum of association with Mr. *Karuth's* signature, by which Mr. *Karuth* agreed to take ten shares only in the company, and he alleges that it appears by a document of even date, namely, the articles of association, which are also signed by Mr. *Karuth*, that Mr. *Karuth* is liable for another forty shares. Now in order to succeed, the liquidator must shew an agreement on Mr. *Karuth's* part to take those forty shares. This he attempts to do by having recourse to the articles, which say in effect that the qualification of a director shall be the holding of fifty shares; that Mr. *Karuth* shall be one of the first directors; and that the office of a director shall be vacated if he ceases to hold the prescribed number of shares. Now the words "if he ceases to hold" imply that he already holds the prescribed number of shares. So that we come back to the question which I had occasion to consider in *Forbes' Case* (1), whether the qualification clause is intended to apply to the first directors of the company. It is impossible that the man who, by signing the memorandum of association for ten shares, has agreed to take that number of shares only, can acquire the greater number of shares required for a qualification except by some subsequent proceeding; so that the qualification clause cannot apply to a first director, at least until he has had a reasonable time for acquiring the necessary number of shares. I respectfully assent to the remark of Lord Justice *Mellish* in *Brown's Case* (2), that the expression that he must be qualified by holding so many shares does not oblige him to take shares from the company. In the case of an old company, where all the shares are allotted, he certainly cannot, but must acquire shares the best way he can; and I think there is good ground for holding that becoming a director only involves an agreement to have the qualifying shares within a reasonable time. In my opinion a reasonable time had not elapsed in this case. Mr. *Karuth* never attended any board meeting or took part in the management of the concern, and within three days after the publication of the prospectus he withdrew from the company before any allotment of shares could have been made to him. Reading

(1) Law Rep. 19 Eq. 353. (2) Law Rep. 9 Ch. 102.

M. R. 1875 KARUTH'S CASE.

the articles to mean that a man shall qualify himself within a reasonable time after becoming a director, I think that a reasonable time had not elapsed in this case; and I should find no difficulty in so deciding but for some of the decisions to which my attention has been called.

*Currie's Case* (1) is difficult to understand. The facts were, that prior to the formation of the company the provisional directors had agreed each to take 100 shares in the company and to execute the articles and memorandum of association when ready, and to act as directors of the company; and the articles provided that the subscribers of the memorandum should be deemed to be directors until others were appointed, and that each director should hold at least 100 shares. The decision was, that it having been the duty of the provisional directors themselves to appoint directors, and default having been made by them in so appointing, they must be considered in equity to have appointed themselves and to be chargeable accordingly, with the result that they were liable to be put upon the list of contributories for their respective qualification shares. I gather from the reports of the case, especially from the report in the *Law Journal*, that those gentlemen had acted as directors. That must have been the case, for the mere omission on their part to appoint directors could not alone have made them chargeable as directors. I have always thought the ground of that decision to be the express agreement on their part prior to the formation of the company, to take 100 shares each. Be that as it may, assuming them to have acted as directors, it is quite clear that a reasonable time for qualifying themselves had elapsed before the winding-up.

[His Honour then referred to the judgments in *Forbes' Case* (2) and *Brown's Case* (3), and continued:—]

These cases establish that it is sufficient if a person who becomes a director possesses himself of the necessary number of shares before he acts. Here Mr. *Karuth* has not acted; and the conclusion I come to on the authorities is, that the mere acceptance of the office of director does not make a man a shareholder in respect of the number of shares necessary to qualify him; but the

(1) 3 D. J. & S. 367; S. C. 32 L. J. (Ch.) 421.

(2) Law Rep. 8 Ch. 768.

(3) Ibid. 9 Ch. 102.

M. R.
1875
KARUTH'S CASE.

acceptance of the office and the acting as a director will be taken as an implied agreement on his part to qualify himself within a reasonable time; and he will not be allowed afterwards to contradict his own conduct. I do not think the authorities prevent me from holding that Mr. *Karuth* is a contributory in respect of the ten shares only for which he signed the memorandum.

Solicitors for the Official Liquidator: Messrs. *Paddison, Son, & Titley.*

Solicitor for Mr. *Karuth:* Mr. *J. C. Campbell.*

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## SMITH *v.* PETERS.

M. R.
1875
*June* 24.

[1875 S. 146.]

*Vendor and Purchaser—Agreement for Sale of Fixtures at Valuation by Person named—Specific Performance—Interlocutory Application—Mandatory Order.*

26 L.T.

Where an agreement has been entered into for the sale of a house at a fixed price, and of the fixtures and furniture therein at a valuation by a person named by both parties, and he undertakes the valuation, but if refused permission by the vendor to enter the premises for that purpose, the Court will make a mandatory order to compel the vendor to allow the entry to enable the valuation to proceed.

The Court has jurisdiction to make any interlocutory order which is reasonably asked as ancillary to the administration of justice at the hearing.

THIS was a motion made in a suit for the specific performance of an agreement entered into by the Defendant, *Miles Peters*, a licensed victualler, and owner of a leasehold public-house known as *The Yorkshire Stingo Tavern*, for the assignment to the Plaintiff of the said premises, and of the good will of the business there carried on.

By the agreement, dated the 26th of April, 1875, and signed by the Defendant, the vendor, and the purchaser, who was agent for the Plaintiff, in consideration of £500 deposit money, and the further sum of £10,200, the Defendant agreed to assign to the purchaser the lease of the said premises and the goodwill thereof, and the purchaser agreed to purchase, at a fair valuation to be made by Mr. *Lound*, who was nominated by the parties thereto,

M. R. 1875 SMITH v. PETERS.

such part of the household furniture, fixtures, and other effects then on the premises as the Defendant might have a right to sell.

The bill alleged that Mr. *Lound* and his clerks had, in pursuance of the agreement, commenced taking the inventory, but that the Defendant refused to permit him to complete it, or to proceed with his valuation, intimating that he did not intend to complete the agreement.

The bill was accordingly filed on the 4th of June, praying that the agreement might be specifically performed, and that the Defendant might be ordered to permit *Lound* at all seasonable times to enter into the premises for the purpose of inspecting and making an inventory of the said furniture, fixtures, and other effects.

A motion was now made on behalf of the Plaintiff for an interim order on the Defendant to permit the said *John Lound*, or his clerks, at all seasonable times, and on proper notice being given, to enter upon the premises for the purpose of inspecting and making the said inventory. Evidence was adduced in support of the Plaintiff's case, but no affidavit was filed by the Defendant in reply.

Mr. *Chitty*, Q.C., and Mr. *Daniel Jones*, for the Plaintiff, in support of the motion, cited *Kynaston* v. *East India Company* (1).

Mr. *Waller*, Q.C., and Mr. *Begg*, for the Defendant, contended that it was contrary to the practice of the Court to make a mandatory order of this nature on an interlocutory application before the hearing of the cause. In this case there was only an incomplete contract, which the Court could not compel the Defendant specifically to perform: *Milnes* v. *Gery* (2); *Darbey* v. *Whitaker* (3); *Jackson* v. *Jackson* (4); *Richardson* v. *Smith* (5); *Clarke* v. *Mackintosh* (6).

Mr. *Chitty*, in reply, referred to *Vickers* v. *Vickers* (7).

SIR G. JESSEL, M.R.:—

The first question that I have to consider is, whether this appli-

(1) 3 Sw. 248.
(2) 14 Ves. 400.
(3) 4 Drew. 134.
(4) 1 Sm. & Giff. 184.
(5) Law Rep. 5 Ch. 648.
(6) 4 Giff. 134.
(7) Law Rep. 4 Eq. 529.

cation is in accordance with the practice of the Court. I have no hesitation in saying that there is no limit to the practice of the Court with regard to interlocutory applications so far as they are necessary and reasonable applications ancillary to the due performance of its functions, namely, the administration of justice at the hearing of the cause. I know of no other limit. Whether they are or are not to be granted must of course depend upon the special circumstances of the case. But if authority were wanting for my guidance in this matter—and I think the principle is so clear that authority is not wanting—I might refer to the case which has been mentioned by the Plaintiff's counsel, of *Kynaston* v. *East India Company* (1), which was an application in a tithe suit to inspect the Defendant's house before the hearing, in order to ascertain its value. The object in ascertaining its value would be to make a decree against the Defendant at the hearing. Here the object of ascertaining the value is also to make a decree against the Defendant at the hearing. What does Lord *Eldon* say? "I have found no case in point, but on principle I think the Court has authority." Therefore, in deciding the question of practice, he only looked at the principle. That is what I am going to do.

In the present case there was an agreement for the sale of a public-house, and the fixtures, furniture, and other effects. There is no evidence that the value of the fixtures and furniture was so large as to be an essential portion of the contract. It was agreed that such part of the household furniture, fixtures, and other effects as the Defendant could dispose of should be taken at a valuation to be made by Mr. *Lound*, who is a valuer appointed by both parties. If this were the hearing of the cause, Mr. *Lound* being ready to make the valuation, I see no reason why a decree for specific performance should not be made, and the subsidiary matter, namely, the completion of the valuation, be proceeded with afterwards. The contract could then be completed within sufficient time.

The Defendant has adduced no evidence in defence of his conduct; he has obstructed Mr. *Lound* in the performance of the duty which he has agreed that he should perform. Can it be tolerated, in a country in which violence is not allowed, in which

(1) 3 Sw. 248.

M. R. 1875 SMITH v. PETERS.

Mr. *Lound* and his clerks would not be permitted to force an entry, although in pursuance of an agreement, that a Court of justice shall say no provision can be found for such a case, and that it shall be permitted to a Defendant to say, "Although I have sold this furniture and fixtures at a valuation to be made by Mr. *Lound*, a valuer of my own choice, I will at my will and pleasure obstruct Mr. *Lound* in the performance of his duty, and prevent his completing the valuation which I have already contracted he shall make"? I do not believe it to be the law of this Court, and I do not believe it will ever be so decided.

Again, if authority be wanting to confirm what I have said, I think there is such authority to be found in the case of *Vickers* v. *Vickers* (1). Sir *W. Page Wood*, V.C., says this: "The Court has adopted this principle"—that is, the principle of not enforcing sales by valuation to be made—"(I am not sure that it has not extended it) from the civil law as stated in the Code of *Justinian*, who seems to have taken great pride in having decided a point, which he said was a knotty point, and had occasioned great controversy among lawyers, namely, if a given man is to name the price, whether that is to be considered as equivalent to the *arbitrium boni viri*. The Emperor *Justinian* (Inst. 3, 24, 1; Cod. 4, 38, 15) determined that if *Titius* be unable or unwilling to name the price, the sale is null. But he does not say that if one of the parties to such an engagement were to throw any obstacle in the way and avail himself of what, in ordinary cases, we should call his own wrong, the Court would still hold the same view, and that a substitution could not be made in order to give effect to the *bona fides* of the contract." When he says "he does not say," I consider the learned Vice-Chancellor to have meant that he would so have decided. Certainly I shall so decide, and order that *Lound* be permitted to enter the premises for the purposes mentioned in the notice of motion on giving twenty-four hours' notice, the inspection to be limited to two working days between the hours of ten and six.

Solicitors for the Plaintiff: Messrs. *Stileman & Neate.*

Solicitors for the Defendant: Messrs. *Mackeson, Taylor, & Arnould.*

(1) Law Rep. 4 Eq. 535.

## MIDDLETON *v.* POLLOCK.

[1873 M. 204.]

## *Ex parte* KNIGHT AND RAYMOND.

M. R.
1875
*June* 26.

*Equitable Set-off—Debt to Joint Creditors contracted by Fraud—Separate Debt due from one of Joint Creditors.*

There is no rule that a debt due to joint creditors, which has been contracted by fraud, can be set off against a separate debt due from one of the joint creditors.

*Ex parte Stephens* (1) and *Vulliamy* v. *Noble* (2) explained.

*P.*, the solicitor of *K.* and *R.* (who were trustees of a marriage settlement), received on their behalf the sum of £4000, and represented that he had invested the whole of it on mortgage. He did invest on mortgage two sums of £2200 and £850, part thereof; but he never invested the balance of £950. The debt of £2200 was (with the knowledge of *K.* and *R.*) paid off and received by *P.*, and retained by him for reinvestment; but no reinvestment was ever made. *P.* died insolvent:—

*Held*, that neither of the sums of £2200 and £950 due from his estate could be set off against a separate debt due to the estate from *K.*

THIS was a creditor's suit for the administration of the estate of *Alfred Atkinson Pollock*, a solicitor, who died on the 10th of August, 1873. His estate had proved to be insolvent.

Mr. *Pollock* acted as solicitor for Messrs. *Charles Raleigh Knight* and *George Raymond*, the trustees of a settlement made on the marriage of Mr. and Mrs. *Spring*. Part of the trust property consisted of a sum of £10,000 secured by a mortgage on certain real estate belonging to Mr. *Spring*.

In 1867 Mr. *Spring* sold this estate, and it was arranged that the mortgage debt of £10,000 should be paid off out of the proceeds of sale, and should be received by Mr. *Pollock* on behalf of the trustees; and he accordingly received that sum on the 31st of December, 1867. He afterwards represented that he had, on the 29th of January, 1868, advanced £4000, part of that sum, to a Mr. *Rabbits*, a builder, on the security of a mortgage of property at *Sutton*.

It now appeared no mortgage was given until the 19th of

(1) 11 Ves. 24. (2) 3 Mer. 593.

M. R. 1875 MIDDLETON v. POLLOCK. *Ex parte* KNIGHT AND RAYMOND.

August, 1868, on which day *Rabbits* executed two mortgages to Messrs. *Knight* and *Raymond*, one for securing £850, and the other for securing £2200. The remaining £950 was never advanced to *Rabbits* at all, nor was any mortgage given for it; but *Pollock*, in his books, debited *Rabbits* with £4000, and credited him from time to time with the interest of £950.

In December, 1872, *Pollock* wrote a letter to Mr. *Knight*, stating that the property on which the sum of £2200 lent to Mr. *Rabbits* was secured had been sold, that he would readily be able to obtain another security for £2200, and that Mr. *Rabbits* would still remain liable for the interest at 5 per cent. on the £2200 until a new security was found. Mr. *Knight*, upon the representations contained in this letter (although he had believed that the £4000 had been advanced in one sum), executed a reconveyance of the property; and Mr. *Raymond* afterwards did the same. *Pollock* received the £2200 when paid off, but never made any reinvestment thereof.

From June, 1868, down to June, 1873, *Pollock* regularly paid to Mr. *Spring* interest at 5 per cent. on the £4000, but at his death the only security for any part of the trust fund which was found to be forthcoming was the mortgage for £850.

Mr. *Knight* was at the time of *Pollock's* death indebted to him in the sum of £2014 7*s.* 5*d.* in respect of payments which had been made by *Pollock* on Mr. *Knight's* behalf. A summons was taken out in the suit by Messrs. *Knight* and *Raymond*, asking that Mr. *Knight* might be at liberty to retain the amount due from him to *Pollock's* estate in part satisfaction of the sum of £3150 found due from his estate to Messrs. *Knight* and *Raymond* as trustees of Mr. and Mrs. *Spring's* marriage settlement. This summons was adjourned into Court, and now came on to be heard.

Mr. *Southgate*, Q.C., and Mr. *Wolstenholme*, for Messrs. *Knight* and *Raymond*:—

Where a debtor, by fraudulent conduct, prevents a party from making a claim to which he is justly entitled, equity allows that party a right of set-off, even of a debt owing by him jointly with another person: *Ex parte Stephens* (1); *Vulliamy* v. *Noble* (2);

(1) 11 Ves. 24. (2) 3 Mer. 593, 621.

*Ex parte Hanson* (1). Here *Pollock* falsely represented to Messrs. *Knight* and *Raymond* that the trust fund belonging to them was invested on mortgage; by those representations they were prevented from taking any proceedings against *Pollock*, and his representative cannot sue *Knight* without allowing a set-off in respect of the debt due to him and *Raymond* jointly. If in the lifetime of *Pollock*, *Knight* had discovered the true state of facts, he might have appropriated the debt due from him to the £3150 due to the trust estate, or he might, by investing £4000 in the joint names of himself and his co-trustee, have acquired the right to sue *Pollock*; and the cases cited shew that it makes no difference that he has not made such an investment, if (as was the case) he was prevented from discovering the truth by *Pollock's* misrepresentations.

Mr. *Fry*, Q.C., and Mr. *Romer*, for the Plaintiff.

Mr. *W. Barber*, for the Defendant.

SIR G. JESSEL, M.R.:—

This case divides itself into two distinct portions, with which I will deal separately. The whole sum of £4000 was represented by Mr. *Pollock* as having been advanced to Mr. *Rabbits* on mortgage. This was not the case as to £950; but the balance was advanced to Mr. *Rabbits*. Of that balance £2200 was paid off, and Mr. *Pollock* was allowed to retain that sum with a view of finding another investment. I cannot see the slightest claim in respect of the £2200, and that portion of the case may be dismissed altogether. As regards that sum, there was no fraud: it was advanced, it was paid off, and the trustees knew of it.

The real question is as to the £950, which Mr. *Pollock* seems to have dealt with in this way. He seems to have arranged with Mr. *Rabbits* to make an advance of the whole £4000, but Mr. *Rabbits*, who was building some houses, had not got the security ready, and therefore, instead of telling his clients that he had not advanced £950, he debited Mr. *Rabbits* in his book with £4000 advanced on mortgage, and credited him with interest on the £950.

(1) 12 Ves. 346; 18 Ves. 232.

M. R. 1875 MIDDLETON v. POLLOCK. — *Ex parte* KNIGHT AND RAYMOND.

This was a wholly irregular transaction; but, although I much regret to say that in other cases I have not been able to exonerate Mr. *Pollock* from intentional fraud, in this case I do not think there was intentional fraud on his part, although the legal consequences may be the same. It is clear he represented to his clients that the whole sum was really invested on mortgage when it was not, and as the clients deny they had notice to the contrary, I must take it they were kept in ignorance of the real nature of the transaction. Whatever Mr. *Pollock's* motives may have been, the £950 remained in his hands in consequence of misrepresentations by him which would entitle the clients to say the debt was incurred, so far as he was concerned, by fraud.

The question I have to consider is whether that entitles the clients to say that that sum of £950 shall be set off against a sum of £2014 due from *Knight*, one of the trustees, in respect of an advance to him on his own private individual account.

Now, in the first place, *Pollock* had notice of the trust; he, therefore, knew that he could not properly pay £950, part of the trust fund, to *Knight* alone, passing over the other trustee. Consequently it is impossible to appropriate £950, part of the £2014, as payment to *Knight* on account of *Knight* and *Raymond*. Payment is out of the question. But it was said that inasmuch as the debt of £950 was contracted by fraud, that *Knight* would have a right to say, "If I had known the truth of the case I would have appropriated part of the £2014 to make good the £950." I am not aware of any such right. As far as I know, all that could have been done would have been for *Knight* and *Raymond* to sue Mr. *Pollock* to recover that money. I do not know of any right to set off as against the joint demand the several debt of one of the joint creditors. There is no such set-off either in law or equity.

But then it was said that there is authority to shew that if the debt sought to be set off was contracted by fraud a different rule prevails; that, although the separate debt of one of the joint creditors was not contracted by fraud you can set off that against the debt of the joint creditors which was contracted by fraud. It is difficult to see on principle how you can be in a better position than if you had known the facts; and if the facts had been

known, there could be no such set-off. The decisions of Lord *Eldon* on the subject do not bear out the proposition at all. *Ex parte Stephens* (1) was the first case. The facts of that case are very plain. *Castell* and *Powell* were bankers. Miss *Stephens* was their customer. She directed them to sell some Exchequer Annuities and invest the proceeds in 5 per Cent. Navy Annuities. They did sell the Exchequer Annuities, and they told her they had bought the Navy Annuities. However, instead of buying the annuities they kept the proceeds, being £3320 11*s.* 11*d.*, in their pockets. They regularly paid her the dividends until they became bankrupt. In the meantime, her brother, *James Stephens*, being a customer of the same bankers, borrowed from them £1000 on the security of the joint and several note of himself and his sister, so that the brother was the principal debtor to the knowledge of the bankers, the sister joining as his surety to their knowledge, and becoming liable on a joint and several note. The bankers became bankrupt, and thereupon the assignee brought an action against the brother to recover the £1000. A petition was presented by him and the sister, praying that they might set off what was due upon the note from the debt due from the bankrupts to *Ann Stephens*, and that she might prove for the residue; and that was the order made. What was the reason for the order? The Lord Chancellor says (2): "The question upon the petition is treated as a question of set-off. But it is not here raised as a question of set-off in the strict and technical sense. The question upon the whole is, whether the Chancellor, exercising the jurisdiction in bankruptcy, namely, both a legal and equitable jurisdiction, can interpose against an action brought by the assignees, not against Miss *Stephens*, but against her brother, upon his note as a several promissory note." Then he says further on: "But in this case my ground is that the contract was entered into by Miss *Stephens* in ignorance." That is the first ground, namely, that she became surety for her brother in ignorance of the fact of the bankers having committed the fraud, and on that ground he would have set aside the suretyship, but it was not necessary to decide on that ground, for he says: "And if not, I should make the same construction; for if they had her money in their hands, as

(1) 11 Ves. 24. (2) 11 Ves. 26, 27, 28.

M. R.
1875
MIDDLETON v. POLLOCK.
*Ex parte* KNIGHT AND RAYMOND.

she was upon the face of the instrument a surety, it was against conscience to do any act as against her which should prevent her having what was no more than the proper use of her own money" —the proper use being to pay the several promissory note—"retaining her right to proceed against the person for her reimbursement as far as she fairly could"—that person being the brother—"and it was competent to her if she had made the discovery immediately after the transaction on account of her brother, to have desired that so much of the debt should be cancelled and the difference paid." That means the debt due by her cancelled, and the difference paid to her—to set off the several debt due by her on the promissory note against so much of the several debt due by the bankers to her by reason of the sale of the annuities. Then his Lordship says that she might also have said: "She had a demand against her brother for the sum of £1000 as paid to his use; also upon the statute of mutual debts and credits: and they shall not be permitted to say she shall not, if she chooses, pay the debt, when the consequence is that she loses her money, and they can call upon him. If she had this equity before the bankruptcy, so she has it afterwards, and therefore she has a clear right to say they shall hold £1000 of her money in discharge of the note, and shall deliver up the note. The consequence is they are prevented from suing upon the note by the clear demand of justice she has against them, and therefore they have no right to complain." It appears to me that that is, if I may say so, a very sensible and clear equity. If she had not by fraud been kept in ignorance of the facts, she would have known that the bankers had a £3000 debt due to her, and that she owed them £1000 on the promissory note, and she would have said to them, "Set one against the other, and pay as much of the balance as you can;" and in that case she would have paid £1000 as the surety, and would have had a right to sue the brother from time to time, and to stand in the place of the bankers as his creditors. After the bankruptcy the assignees could be in no better position: they only took what the bankrupts were entitled to, and they could not have been allowed to say, "You had no right of set-off before action brought," because it was their own fraud which prevented her knowing the facts which gave rise to the right of set-off. But the right of set-off

was indisputable. There was a several demand on the one side and on the other; and therefore the only relief that she got was relief against the neglect to assert that right in due time, which was not really neglect, but rather omission—caused by the fraudulent concealment by the bankers of the true facts of the case; and neither they nor their assignees could take advantage of their fraudulent concealment to deprive her of that right of set-off. That is all that *Ex parte Stephens* (1) decides.

The other case was *Vulliamy* v. *Noble* (2), which was shortly this: *Vulliamy*, the father, as a security to his bankers for a separate debt due from him, had transferred to the bankers £8700 4 per Cent. Bank Annuities, and £1425 3 per Cent. Bank Annuities; in round figures, £10,000 Bank Annuities. He afterwards paid off part of that separate debt, but he and his sons had previously borrowed some more money on their joint notes. Finally the whole of the separate debt was paid off, but the stock was not retransferred. The bill alleged that it ought to have been retransferred, "but the same being considered by the banking house to remain in *Noble's* name" (that is in the name of one of the bankers) "as a collateral security for the money advanced to both Plaintiffs on their joint notes, and the Plaintiff *Vulliamy*, the father, having a high opinion of the honour and solvency of the house, he (the said Plaintiff) did not require a retransfer." In other words, the stock was retained by the banking house as security, with the assent of the owner, for the repayment of the money secured by the joint notes. The answer took the same view as the bill, because the Defendants "admitted that no part of the stock transferred by the Plaintiff to *Noble* had ever been retransferred to the Plaintiff; and *Noble* said that the reason why that sum had not been retransferred during the solvency of the house, was because the Plaintiff had always remained indebted to the house during that time." So that they both agreed it was kept as security for the payment of the joint notes. That being so, the bankers sold the stock unknown to the Plaintiff, and kept the money; the result of which was that the bankers became indebted to the Plaintiff, not for the sum the stock produced, but that sum *minus* the amount due on the joint notes. If bankers, having the

(1) 11 Ves. 24.

(2) 3 Mer. 593.

M. R. 1875 — MIDDLETON v. POLLOCK. — *Ex parte* KNIGHT AND RAYMOND.

security of the stock to pay the joint notes when they become due, sell the stock, in equity they are only liable to account for the balance; that is, they ought to have appropriated the proceeds of the stock first to pay off the debt due to themselves, and then to have handed over the balance due to the person depositing the stock. Strictly speaking, perhaps, they ought not to have sold more stock than was necessary for that purpose. In either way the bankers would owe nothing in respect of so much of the amount of the proceeds of the stock as was equivalent to the debt due to themselves, and that is all that was decided in *Vulliamy* v. *Noble* (1). All the Plaintiff got was what was called (although inaccurately) a set-off; that is, he owing them money on the joint notes, was not to pay the money, but it was considered to have been paid *pro tanto* by the sale of the stock, and in that way he had a right to insist in equity that persons who had security should dispose of that security in the proper way, namely, by applying the proceeds in payment of the mortgage debt, if you may so call it; and they could not say because they sold it too early that the equity did not apply. That is the whole effect of the decision. No doubt in the final judgment of the Lord Chancellor it was called an equitable set-off, but this was said in the course of the argument by the Lord Chancellor (2): "There is a difficulty as to the joint note of father and son. What is the evidence of there having been an agreement that this stock should be held as a security for the joint debt?" The answer is, "That evidence is to be found in the nature and in the continuance of the transaction, and when all circumstances are taken together, and coupled with the fact that no retransfer was called for, and the books being attended to in which both *Vulliamys*, father and son, are credited, and the accounts made up according to this course of dealing and mutual understanding between the parties, it is impossible not to infer an intention that the stock of *Vulliamy* should remain a security for all the notes, both his own separate notes and the joint note of himself and his son." Having made that observation during the course of the argument, and getting that answer, then in the final judgment he refers to the case of *Ex parte Stephens* (3), and says: "There the sister of a person who was debtor

(1) 3 Mer. 593. (2) 3 Mer. 612.

(3) 11 Ves. 24.

to the banking house gave her personal undertaking for the debt of her brother, being at the time ignorant that the bankers had money of hers in their hands, for which they were accountable, and which she prayed by her petition might be set off against that particular debt. That is precisely the present case. You are right, therefore, on this point as to the set-off, and must have your costs." That is the whole judgment. Therefore, the reason for the judgment was that he held it as security for the joint debt, and not set-off properly so called, but the application of the proceeds of the security for the payment off of the debt for which security was given. In that way there is no difficulty in the case, although it would have been more satisfactory if the observations made in the argument had been repeated in the judgment.

Now the present case is simply this: £950 is due to *Knight* and *Raymond* on a joint account as trustees. That being so due, £2000 is advanced to *Knight* on his private account. In no sense and in no way can that be a payment to *Knight* on account of *Knight* and *Raymond*, and in no sense could *Knight* have had the right to set that off if he had known all the facts, because he could not, as trustee, receive the trust money. The only suggestion that was made was this—that if he had known the facts, he might have replaced the amount in the names of *Knight* and *Raymond*. That is too remote for me to consider, especially having regard to these circumstances, namely, that he did know of the £2200 being in the hands of Mr. *Pollock* for investment, and having that high opinion of him which was entertained at the time by all his clients (and without which it would be impossible that any man could commit these frauds), he did not pay off the £2200, or take proceedings against Mr. *Pollock*, and therefore it is quite certain that if he had been told of the actual fact that *Pollock* was keeping it to see whether he could advance it to *Rabbits* on security or otherwise, he would not have paid it off or transferred the amount. I am of opinion, therefore, that the case of equitable retainer or equitable set-off fails.

Solicitors: Messrs. *Domville, Lawrence, & Graham;* Messrs. *Farrer, Ouvry, & Co.*; Messrs. *Ridsdale, Craddock, & Ridsdale.*

M. R.
1875
July 1.

## *In re* MALAGA LEAD COMPANY.

### FIRMSTONE'S CASE.

*Winding-up—Contributory—Allottee of paid-up Shares—Contract in Writing by Articles of Association—Companies Act*, 1867 (30 & 31 *Vict. c.* 131), *s.* 25.

The articles of association of a limited company provided that the directors should offer for subscription certain debenture bonds, and that with each bond they should allot, by way of bonus to the lenders, fully paid-up shares of equal value to the amount of such bond. *F.*, who was already a member of the company, subscribed for some of the bonds, and bonus shares of equal nominal value were allotted to him and registered in his name as paid-up shares. The company was afterwards ordered to be wound up:—

*Held*, that the articles of association did not constitute a contract in writing within sect. 25 of the *Companies Act*, 1867; that the requirements of that section had not been complied with, and that *F.* was liable as a contributory in respect of his bonus shares.

THIS was an application by the official liquidator of the *Malaga Lead Company, Limited*, which was registered under the *Companies Acts*, 1862 and 1867, to place the name of Mr. *Firmstone* on the list of contributories in respect of certain bonus shares.

The company was registered in October, 1871. The articles of association provided that the directors, immediately upon the registration of the company, should offer for public subscription a loan to the amount of £20,000, to be secured to the lenders by the issue of first mortgage debenture bonds to the amount of £20,000, bearing £15 per cent. per annum interest, and that with each of the debenture bonds so issued the company should allot and issue, by way of bonus to the lenders, fully paid-up shares of equal value to the amount of each bond.

Some of these debenture bonds were subscribed for by *Firmstone*, who was already a member of the company, and on the 20th of July, 1872, bonus shares of equal nominal value to the amount of his bonds were allotted to him and registered in his name as paid-up shares, and were standing in his name at the time of the winding-up order.

No special contract in writing relative to these shares was made and filed with the Registrar of Joint Stock Companies.

Mr. *Southgate*, Q.C., and Mr. *John Cutler*, for the official liquidator, now applied that Mr. *Firmstone* might be made a contributory in respect of his bonus shares as shares upon which nothing had been paid. They relied on *Pritchard's Case* (1).

Mr. *Chitty*, Q.C., and Mr. *Ince*, Q.C., for Mr. *Firmstone*:—

We contend that Mr. *Firmstone* cannot properly be made a contributory in respect of the bonus shares. The case comes within the exception contained in sect. 25 of the *Companies Act*, 1867. That section provides "that every share in any company shall be deemed and taken to have been issued and to be held subject to the payment of the whole amount thereof in cash, unless the same shall have been otherwise determined by a contract duly made in writing and filed with the Registrar of Joint Stock Companies at or before the issue of such shares."

It is true that *Firmstone* did not actually sign a contract at the time these shares were allotted to him, but he had previously become a member of the company, and the articles of association constituted "a contract in writing" within the meaning of the section, to which all the shareholders must be taken to be parties as if they had themselves signed them according to the provisions of sect. 16 of the Act of 1862.

*Pritchard's Case* is distinguishable, for there *Pritchard* could not have availed himself of the articles, whereas here the contract could not be made in any other form.

In the case of *In re Appletreewick Lead Mining Company* (2), where the owners of a mine had formed themselves into a company registered under the Acts of 1862 and 1867, and signed the memorandum and articles, the capital being divided into £10 shares allotted to the members in proportion to their interest in the mine, and it was stated in the articles that the sum of £10 should be credited on each of these £10 shares,—it was held that this was a valid contract within sect. 25.

The 25th section was not intended to create liability in such a case as this: *Bush's Case* (3); *Hartley's Case* (4).

Supposing these shares had been cancelled, and new ones issued

(1) Law Rep. 8 Ch. 956.
(2) Ibid. 18 Eq. 95.
(3) Law Rep. 9 Ch. 554.
(4) Ibid. 10 Ch. 157.

M. R. 1875 FIRMSTONE'S CASE.

after a separate agreement in writing had been registered, there clearly could have been no liability. We submit that liability cannot attach to the shares because this formality has not been gone through.

SIR G. JESSEL, M.R.:—

Assuming that I am not bound by any judicial decision to interpret sect. 25 of the *Companies Act*, 1867, otherwise than according to the plain meaning of the words, I think there can be no reasonable doubt in this case.

The section is this:—[His Honour then read the section.] What is the "contract" there referred to? Surely it must mean the contract relating to the shares to be issued under it. The words "duly made in writing" mean, I suppose, made by the contracting party.

It is not pretended in this case that any contract relating to the taking of these shares was signed by Mr. *Firmstone* and filed with the Registrar of Joint Stock Companies at or before the issue of the shares; but it is said that, having regard to the provision of the articles of association as to the issue of such shares, and the fact of Mr. *Firmstone* being a shareholder at the time when they were issued, the articles of association amount to a contract in writing within the purview of the 25th section. But, as I read the articles of association, they contain no contract to take bonus shares. There is a contract between the members of the company that there shall be power to raise money by the issue of bonds and to annex to these bonds paid-up shares, but there is no contract on the part of anybody to take these shares. It is said the articles of association are equivalent to a contract duly made in writing within the meaning of the 25th section, because Mr. *Firmstone* was a member of the company, and the 16th section of the *Companies Act*, 1862, says that the articles of association, when registered, shall bind the company and the members thereof to the same extent as if each member had subscribed his name and affixed his seal thereto; but that means at the time of becoming a member, whereas this was a subsequent transaction. In fact, Mr. *Firmstone* has done nothing to comply with the requirements of the 25th section.

M. R. 1875 FIRMSTONE'S CASE.

It is said the decisions compel me to take a different view of the case, but I think that *Pritchard's Case* (1), which is a decision of the Court of Appeal, is directly in point, and that *Hartley's Case* (2) has no bearing upon the question, as here there is no contract at all in writing to take shares.

It is a case of great hardship, and I most reluctantly decide that the amount of these shares is payable in cash.

Solicitor for the Official Liquidator: Mr. *J. S. Salaman.*

Solicitors for Mr. *Firmstone:* Messrs. *Tucker & Lake.*

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## *In re* MARQUIS OF SALISBURY.

M. R. 1875 *July* 1.

*Settled Estate—Grant by Tenant for Life—Infant Remainderman—Concurrence of Guardian—Jurisdiction—Places of Worship Sites Act*, 1873 (36 & 37 *Vict. c.* 50), *s.* 1.

Where the concurrence of a guardian for an infant remainderman is required to a grant of land by a tenant for life in possession as a site for a church, under 36 & 37 Vict. c. 50, s. 1, the guardian by nature of such infant is not the proper person to concur.

In such a case the Court has no jurisdiction to appoint a guardian.

Cited by C of A 2 C.L.D. 29.

THIS was a case stated for the opinion of the Court under the *Vendor and Purchaser Act*, 1874, s. 9.

In a grant by the Marquis of *Salisbury* to the Ecclesiastical Commissioners, under 36 & 37 Vict. c. 50, s. 1, of a piece of land as a site for a church, being part of the estates of which the Marquis was tenant for life in possession, and his eldest son, Viscount *Cranbourne*, an infant fourteen years of age, was tenant in fee in remainder, the question arose whether the Marquis, as the natural guardian of his son, was the proper person to concur on his behalf within the meaning of the statute.

Mr. *W. W. Karslake*, for the Marquis of *Salisbury.*

Mr. *Hastings*, Q.C., for the Ecclesiastical Commissioners.

(1) Law Rep. 8 Ch. 956. (2) Law Rep. 10 Ch. 157.

M. R. 1875 *In re* MARQUIS OF SALISBURY.

SIR G. JESSEL, M.R. :—

I do not think the guardian mentioned in the Act is the guardian by nature. The Act requires the concurrence of the remainderman as a check upon the tenant for life, and the question whether the father of an infant remainderman is the proper person to be appointed guardian in giving away a piece of the estate of which the father is tenant for life in possession, must depend on circumstances. The Act does not say how the guardian is to be appointed, and I doubt whether the Court has any power of its own to appoint a guardian of the estate for an infant whose estate is not in possession, the jurisdiction existing for the sole purpose of taking care of an infant's present property. No authority has been produced for so holding, and in the absence of authority I shall not hold that the Court has any such jurisdiction.

Solicitors for the Marquis of *Salisbury:* Messrs. *Nicholson & Herbert.*

Solicitors for the Ecclesiastical Commissioners: Messrs. *White, Borrett, & Co.*

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M. R. 1875 *July 5.*

## DRINKWATER *v.* RATCLIFFE.

[1874 D. 70.]

*Partition—Sale—Partition Act*, 1868 (31 & 32 *Vict. c.* 40), *ss.* 3, 4, 5—*Undertaking to purchase by Married Woman.*

The 3rd and 4th sections of the *Partition Act*, 1868, are not controlled in their operation by the 5th section of that Act.

The undertaking to purchase mentioned in the 5th section of the Act cannot be given by a married woman whose husband does not join therein.

Property consisting of a farmhouse and buildings and thirty acres of land was divisible into thirty-six shares; fifteen of them were vested in eight persons who desired a sale, six of them being entitled to one thirty-sixth share each; the remaining twenty-one were vested in a married woman living apart from her husband. The married woman was in occupation of the farm and opposed a sale, and was willing to give an undertaking to purchase the fifteen shares, but her husband did not join therein. There was evidence that the property would sell advantageously for other than agricultural purposes:—

*Held*, that the owners of the fifteen shares were entitled to a sale under the

5th section of the *Partition Act*, 1868, because the owner of the remaining shares could not give a valid undertaking to purchase their shares:

*Held*, also, that a sale ought to be directed under the 3rd section, on account of the nature of the property and the number of the parties interested, and because in the opinion of the Court a sale would be more beneficial for the parties interested than a division among them.

THIS was a suit for partition or sale under the *Partition Act*, 1868, of certain real estate consisting of a farmhouse and buildings, and 30A. 0R. 31P. of land, five acres being copyhold and the rest freehold.

The property was divisible into thirty-six shares, of which fifteen were vested in eight persons, Plaintiffs or Defendants in this suit, six of them being entitled only to one thirty-sixth share each. The remaining twenty-one shares were vested in the Defendant *Elizabeth Bennett*, a married woman living apart from her husband, the Defendant *Joseph Bennett*.

It appeared that from 1846 to 1871 the property in question was let as a farm to *John Simpson* (the father of *Elizabeth Bennett*), as yearly tenant, at the rent of £36. *Elizabeth Bennett* lived with her father, and took an active part in managing the farm. *Simpson* died in 1871, and *Elizabeth Bennett* had ever since continued in occupation of the property.

There was evidence that the property could be sold for other than agricultural purposes, and would fetch a good price. The nature of the evidence sufficiently appears from the judgment.

Mr. *Roxburgh*, Q.C., and Mr. *Hastings*, Q.C., for the Plaintiffs, asked for a sale.

Mr. *Chubb*, for Defendants, supported the Plaintiffs' application.

Mr. *Fischer*, Q.C., and Mr. *Nalder*, for *Elizabeth Bennett*:—

Mrs. *Bennett* will undertake to purchase the shares of the Plaintiffs and Defendants who ask for a sale, and we submit that under these circumstances a decree for sale ought not to be made.

Inasmuch as the parties seeking a sale are not interested in the property to the extent of a moiety, the 4th section of the *Partition Act*, 1868, does not apply to this case. The 3rd section may apply; but in the first place that section is controlled by the 5th

M. R. 1875

DRINKWATER v. RATCLIFFE.

section, which confers no new power of sale, but regulates the powers conferred by the 3rd and 4th sections: *Pemberton* v. *Barnes* (1); *Williams* v. *Games* (2).

Again, the power of sale under the 3rd section is discretionary, and ought not to be exercised where the sale would be ruinous to one of the parties. Mrs. *Bennett* has for twenty-five years been accustomed to manage this property; she can make, by means of it, a much better living than she could derive from her share of the proceeds, and the result of a sale would be utter ruin to her. If nothing else can be done, let twenty-one shares be allotted to her, and the remaining fifteen be sold, as was done in *Roebuck* v. *Chadebet* (3).

Mr. *Cookson*, Q.C., for *John Bennett*, took no part in the discussion.

SIR G. JESSEL, M.R.:—

I think I ought in this case to say a few words as to what, in my opinion, is the meaning of the Act.

11 Ch D 80

The 3rd section gives power to the Court to sell for certain reasons. These reasons are specified in every case but one. The reasons specified are, the nature of the property, the number of the parties interested, the absence or disability of some of the parties. The reasons are unspecified in one case, viz., where, by reason "of any other circumstance," a sale of the property and distribution of the proceeds would be more beneficial to the parties interested than a division of the property between or among them. Whenever that happens, and any party interested applies for a sale, the Court may direct a sale. It is an absolute power of sale on the request of anybody, provided the Court is satisfied that it would be more beneficial for the parties interested than a division. Then

5 Ch D. 266

the 4th section provides that if the parties interested, to the extent of a moiety or upwards, request a sale, the Court shall sell, unless it sees good reason to the contrary—that is, irrespective of the nature of the property, irrespective of the number of persons, irrespective of absence or disability, irrespective of any special circumstances

(1) Law Rep. 6 Ch. 685. (2) Law Rep. 10 Ch. 204.
(3) Law Rep. 8 Eq. 127.

which make the Court think it beneficial. The parties interested to the extent of one moiety are entitled to a sale as of right, unless there is some good reason to the contrary shewn; they have not to shew any reason for the sale, but a reason to the contrary must be shewn. The 5th section provides that, if any party interested in the property requests the Court to direct a sale of the property instead of a division, the Court may, if it thinks fit (this is discretionary again), unless the other parties interested in the property undertake to purchase, give all necessary and proper directions for such sale. What does that mean? Under the 4th, where the parties requesting a sale have got more than a moiety, you do not want that; it consequently applies to the case of the owners of less than a moiety making the request. Now that case is provided for by the 3rd section; in every possible case where the Court thinks a sale is proper and for the benefit of the parties interested. Therefore the 5th must apply to a case where the Court sees no reason for preferring a sale to a partition. That case is not provided for by the 3rd, nor is it provided for by the 4th section. Where the Court sees no reason at all, still any party interested may apply; and then there is a limit imposed, and the limit is this, that the Court shall not exercise the new power given by the 5th section, which depends entirely upon the caprice of the party asking, without any opinion of the Court being expressed, if other people will buy. That is a check upon the new power—not, as it has been supposed to be, a limitation of the 3rd and 4th sections—but it is a new power given to any party, whether Plaintiff or Defendant, to apply, with or without any reason whatever, to the Court for a sale, and he is entitled to ask for it unless somebody is going to buy; and then *Williams* v. *Games* (1) says that if he does apply for it, and somebody does offer to buy his share, he may withdraw his request. That is my view of the law; and, considering that *Williams* v. *Games* is the last decision, I think I am entitled to express that view as one that ought to guide me in future, unless corrected, notwithstanding some observations of Lord *Hatherley* in the case of *Pemberton* v. *Barnes* (2), which seem to point to the conclusion that the 5th section was in the nature of a proviso to the following effect: "Provided always that no sale shall be

(1) Law Rep. 10 Ch. 204. (2) Law Rep. 6 Ch. 693.

M. R. 1875 DRINKWATER v. RATCLIFFE.

directed under the 3rd or 4th sections of this Act, if any other party interested shall undertake to buy the share of the parties asking for sale." That appears to me contrary to the plain meaning of the words of the 5th section.

That being so, the only thing I have to consider is, first of all, is the Defendant within the 5th section? Here certainly persons not entitled to a moiety request a sale, therefore they are not within the 4th section; but they may have a sale under the 5th section unless the other parties undertake to purchase. The words "undertake" and "undertaking" are well known, and the undertaking is to be given at the hearing. The party in this case who offers to purchase is a married woman, not separated by law, but as appears from the affidavits, separated in fact from her husband. Her husband does not join in the undertaking, and it appears to me that a married woman in that position cannot give an undertaking at the hearing, and therefore is not within the 5th section, and I so decide. The case was not contemplated by the Legislature, and perhaps had they been aware of it, the Legislature would not have provided for such a case. If she ought to be separated, she can obtain a decree of separation which will give her the rights of a single woman; and if she ought to be divorced, she can obtain a decree of divorce. The Legislature, even if they contemplated such a case, might have intentionally refrained from giving a lady in such a position any new rights—certainly they have given her none such. Therefore, under the 5th section the parties applying are entitled to a sale.

I am also of opinion that the parties are entitled under the 3rd section, and on account of the nature of the property. It appears that six of these parties are entitled to separate thirty-sixths; one has got twenty-one thirty-sixths, another three, another six, and the other six of them one thirty-sixth each. The property consists of a farmhouse and outbuildings, and thirty acres of land, of which twenty-five are freehold and five acres copyhold; so that, in fact, you would have to divide the thirty acres and the house into thirty-six parts. How that is to be done I have not a notion. The Plaintiff's witnesses say it is practically impossible. All the Defendant's witnesses say is that it is not impossible. I agree it is not impossible, but it certainly is very difficult, especially as one does not know how the farmhouse would go, or what its value is,

or whether it would be divided or not divided. But if ever there was a case where, by reason of the nature of the property, you could not divide it conveniently, I think we have it here. But that is not all; the next ground specified by the section is, number of parties. Here it is quite obvious that there are a great number of parties; six of them would have one thirty-sixth a piece, and there are three more—there are nine altogether, and some of them are married women, whose husbands would have to join. Therefore we have got a number of parties.

Then, again, I am to direct a sale if I am of opinion that the sale would be more beneficial for the parties interested. What does that mean? It means in a pecuniary sense. I cannot go into questions of sentiment, I must look merely to the monetary results. Now it is proved, and not denied, that the value of the farm is very much larger to sell than its rental would imply. It is stated that there are factories in the neighbourhood, and this property, which is sworn to by the Defendant as being worth £36 a year, the Plaintiff's witnesses say would fetch £2600. The Defendant's witnesses say it is not worth so much, but they do not venture to say how much less it is worth; from which I come to the conclusion that even in their opinion it would fetch very much more than the something over £1000 which would be its value at thirty years' purchase; probably it may be worth sixty years' purchase, or something of that sort, which would be £2000; the Plaintiff's witnesses put it as high as £2600. It is a farm so situated that it can be used for other purposes than farming purposes. It is advantageous for all persons interested that it should be sold instead of divided, in a pecuniary sense, which, as I have said before, is the only one I am called upon to deal with. I therefore direct a sale.

Solicitors: Messrs. *Deane, Chubb, & Co.;* Messrs. *W. & J. Flower & Nussey;* Messrs. *Milne, Riddle, & Mellor.*

M. R.
1875
July 6.

## CHURCHILL *v.* DENNY.

[1875 C. 34.]

*Marriage Settlement—Agreement to settle after-acquired Property—Half-pay of Naval Officer—Commutation Money under Pensions Commutation Act*, 1871 (34 & 35 *Vict. c.* 36).

*D.*, by his marriage settlement, agreed that if he then was, or should during the intended coverture, at one time and from one source, become entitled to any real or personal property of the value of £100 or upwards for any estate or interest whatsoever, he and all necessary parties should execute and do such assurances and things as should be necessary for vesting the same in the trustees of the settlement.

*D.* was at the time of his marriage in receipt of half-pay (as lieutenant in the navy), which he subsequently commuted, under 34 & 35 Vict. c. 36, for £2175 :—

*Held*, that the commutation money was not bound by the agreement in the settlement.

BY an indenture of settlement made on the marriage of *Alfred Edward Denny* and *Mary Denny*, after reciting (among other things) that it was agreed that all such present and future property of the said *A. E. Denny* as thereinafter mentioned should be settled upon the trusts thereinafter declared concerning the same, certain property of *Mary Denny* was assigned to the trustees upon trust during the joint lives of *A. E. Denny* and *Mary Denny* for *Mary Denny* for her separate use, and after the death of either of them, for the survivor for his or her life, and after the death of such survivor, for the child or children of the marriage as therein mentioned. And the settlement contained the following agreement :—

"And it is hereby agreed that if the said *A. E. Denny* now is or shall, during the said intended coverture, at one time and from one source, become entitled to any real or personal property of the value of £100 or upwards, for any estate or interest whatsoever (except jewels, personal ornaments, furniture, plate, pictures, books, and articles of the like nature), then and in every such case the said *A. E. Denny*, and all other necessary parties, shall, at the cost of the trust estate, as soon as circumstances will admit,

execute and do all such assurances and things as shall be necessary or expedient for effectually vesting the same in the said trustees or trustee upon the trusts hereinbefore declared" concerning the property of the said *Mary Denny*.

At the time of the marriage *Denny* was in receipt of half-pay as a lieutenant in Her Majesty's navy, at the rate of £73 per annum, and about a year afterwards the half-pay was increased to £91 5*s*. per annum. And on the 1st of October, 1873, he retired from the navy, and then became entitled to the yearly sum or half-pay of £166 5*s*.

On the 4th of December, 1874, *Denny*, under the provisions of the *Pensions Commutation Act*, 1871 (34 & 35 Vict. c. 36), commuted his half-pay, and received the commutation money, amounting to £2175 10*s*.

The trustees of the settlement filed their bill against Mr. and Mrs. *Denny*, and their infant child, as Defendants, praying that it might be declared whether the said sum of £2175 10*s*. received by the Defendant *A. E. Denny* for the commutation of his half-pay, was bound by the agreement in the settlement before stated.

Mr. *Stallard*, for the Plaintiffs, the trustees.

Mr. *Miller*, Q.C., and Mr. *Stock*, for Mrs. *Denny* and the infant:—

The commutation money represented property to which Mr. *Denny* was entitled at the time of the settlement, or to which he became entitled at a subsequent period when he commuted his half-pay under the provisions of the Act of Parliament; it was either income, or income in a capitalised form: in either case it was clearly within the terms of the agreement: *Lewis* v. *Madocks* (1).

Mr. *Chitty*, Q.C., and Mr. *Macnaghten*, for Mr. *Denny*, were not called on.

SIR G. JESSEL, M.R., after stating the terms of the recital and of the agreement in the settlement before stated, continued:—

The first allegation is, that *Alfred Edward Denny* was entitled

(1) 17 Ves. 48.

M. R. 1875 CHURCHILL v. DENNY.

at the date of the settlement. He was then a half-pay lieutenant in the navy, and as such he was entitled during Her Majesty's pleasure to receive his half-pay, which is the same as wages, for his services, on condition of his holding himself in readiness to perform such service as Her Majesty should direct. It was not at that time strictly property of any kind or description, but only his chance of earning future wages, as he was liable to be dismissed at pleasure, though it is not the habit of Her Majesty so to dismiss her officers. It was not, therefore, property to which he was then entitled, any more than, in the case of a workman in the receipt of weekly wages, his future wages would be property to which at any given time he would be entitled.

Besides, it does not come within the words of the covenant, as it is not assignable at law, so that it could not have been intended that that which is not "property" within the words of the covenant, nor assignable in fact, should have been included in it.

Then it is said that, as under an Act of Parliament he had a right to commute the half-pay, that is to sell it, and receive a certain sum of money from the Treasury, he thus became entitled to a certain sum of money which of course was personal property after the date of the settlement. That depends upon the meaning of the words "shall become entitled." Now, to become entitled means to acquire a title; as Vice-Chancellor *Kindersley* puts it in *Wilton* v. *Colvin* (1): "What is meant by becoming entitled? . . . Does it not always mean acquiring title? When you find the words 'shall become entitled,' you are always referring to some future interest, to the acquisition of some future title."

If a man has something to sell, and he sells it, and gets the purchase-money, he does not acquire a future title, for it is his title to his property which enables him to get the money for it, or to vary the investment, and varying an investment is not acquiring any title. If a man has a sum of consols, and sells it, and invests the proceeds in £3 per Cent. Reduced Annuities, could it be reasonably argued that he became entitled to them within the meaning of such a covenant as this? Still less would it be reasonable in the case now before me, because here the contention is

(1) 3 Drew. 617, 624.

M. R.
1875
CHURCHILL
v.
DENNY.

that if a man has an annuity which is not property within the terms of the settlement, and sells the annuity, the purchase-money is a subject-matter to which he becomes entitled. I cannot distinguish it from the case of a man selling consols, and purchasing *Blackacre* with the proceeds, or selling *Blackacre*, and purchasing consols with the proceeds. It was not property, nor was it assignable property, and the fact of selling it or offering it for sale does not make it a new acquisition of title so as to bring it within the words of the covenant.

I am, therefore, of opinion that the money in question is not bound by the settlement.

Solicitors for the Plaintiffs: Messrs. *Duncan, Murton, Warren, & Gardner*, agents for Mr. *H. Dewes, Nuneaton.*

Solicitors for the Defendants: Messrs. *Upton, Johnson, Upton, & Budd.*

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## MILDMAY *v.* QUICKE.

M. R.
1875
*July* 10.

[1875 M. 80.]

*Partition Suit—Order for Sale at Hearing—Partition Act*, 1868 (31 & 32 *Vict. c.* 40), *s.* 9.

An order for sale of real estate under the *Partition Act*, 1868, cannot be made at the hearing, unless all persons interested in the property are parties to the cause.

THIS was a suit for partition of real estate, or otherwise for a sale thereof, under the *Partition Act*, 1868.

The bill contained an allegation to the effect that the Plaintiffs and Defendants were the only persons entitled to or interested in the property.

Mr. *W. W. Karslake*, for the Plaintiff, proposed to take a decree directing an inquiry as to what parties were entitled to or interested in the property, and if it should be certified that all the parties entitled to or interested in the property were parties to the cause, or had been served with notice of the decree, then for

M. R. 1875 — MILDMAY v. QUICKE.

a sale, according to the form of decree made in *Harper* v. *Bird* (before Vice-Chancellor *Hall* on the 17th of April, 1875). It was now settled that the 9th section of the *Partition Act*, 1868, did not preclude the Court from ordering a sale otherwise than when the cause came on for further consideration in Court: *Powell* v. *Powell* (1).

Mr. *Northmore Lawrence*, for the Defendants.

SIR G. JESSEL, M.R., said that if all persons interested were parties to the cause a decree for sale could be made at the hearing; but if they were not all parties, then the 9th section of the *Partition Act*, 1868, applied, and a sale could only be ordered "on further consideration." It might be that these words were not used in their strict technical sense, but before a sale could be ordered there must be further consideration of some sort or other; and the utmost that could be done in such a case would be to give liberty to apply at Chambers with reference to a sale in the event of its being certified that all parties interested had been either parties to the cause or had been served with notice of decree. In the present case the decree would be made in the proposed form, but with the omission of the words "or had been served with notice of the decree."

Solicitors: Messrs. *Prideaux & Son;* Messrs. *Gregory, Rowcliffes, & Rawle.*

(1) Law Rep. 10 Ch. 130.

(2) See 1 N (1875) 91. 23 W R 646.

## JONES *v.* CHAPPELL.

M. R.
1875
July 13.

[1875 J. 7.]

*Lessor and Lessee—Waste—Injunction—Nuisance—Weekly Tenant.*

The lessee of land who erects a building thereon without the consent of his lessor does not commit waste within the definition in *Co. Lit.* 53 a unless it can be shewn that such building is an injury to the inheritance.

The owner or lessee of houses let or sub-let to weekly tenants cannot maintain a suit to restrain a temporary nuisance, such as the noise of machinery in adjacent premises, but

*Semble*, such a suit could be maintained by a weekly tenant if the nuisance were of such a nature as to be injurious to his health or comfort.

THE Plaintiff was the lessee of two houses in *Effingham Street* under two leases, dated respectively the 19th of May and the 8th of June, 1863, granted by the trustees of the will of *Thomas Cubitt*. The rooms in these houses were let out to weekly tenants.

These houses at their back adjoined a piece of vacant land from which they were divided by a low wall, and the windows at the back had, at the time of the demise and also shortly before the filing of the bill, free access of light and air. The adjacent piece of land had, by a lease dated the 16th of December, 1852, and granted by the said *Thomas Cubitt*, been demised to *James Smith* for the term of eighty-five years and three quarters. The lease contained a covenant by the lessee to keep all future buildings and erections in repair, and also not to erect any steam-engine on the premises, or commit or do anything which might be a nuisance or annoyance to the tenant or occupier of any messuage or premises near to the premises thereby demised.

The bill alleged that the Defendant, who was assignee of the lease of the last-mentioned premises by an assignment subsequent to the Plaintiff's lease, had lately erected steam-engines and stone saw-mills, and other machinery thereon, and that the noise, steam, and smoke arising from the working of the machinery were a nuisance, and caused great damage to the Plaintiff and his under-tenants, and that the nuisance arising from the works had been so great that several of the Plaintiff's tenants had left his houses, and the value thereof had been seriously depreciated.

M. R. 1875 JONES v. CHAPPELL.

The bill also alleged that the Defendant had erected a staging to carry a travelling crane close to the Plaintiff's windows, which obstructed the light that formerly came through the back windows of the Plaintiff's houses, and was erecting a wall at a distance of only eight feet opposite to the said windows, which obstructed the access of light and air, and rendered the rooms lighted by the back windows nearly uninhabitable.

The Plaintiff charged that he was entitled under his leases to enjoy the access of light and air through the said back windows, and that, as the Defendant claimed to be entitled to the land at the back of the Plaintiff's premises under a lease granted by the Plaintiff's lessors, he was not entitled to obstruct the light and air coming to the Plaintiff's premises.

The bill prayed that the Defendant might be restrained by injunction from sawing any stone or other material, and from working any machinery upon, and from causing any smoke or steam to be emitted from, and from carrying on any works or business upon the land at the back of the Plaintiff's houses, so as to cause any damage or annoyance to the Plaintiff or his tenants; and (secondly) that the Defendant might be restrained from permitting the wall and staging erected by him to remain erected so as to diminish the access of light and air to the windows at the back of the Plaintiff's houses.

Mr. *Chitty*, Q.C., and Mr. *Jason Smith*, for the Plaintiff:—

In this case, although the windows where light is obstructed by the Defendant's buildings are not ancient lights, yet, as the assignment to the Defendant was subsequent to the Plaintiff's lease, he cannot be permitted under such assignment to injure the Plaintiff's houses, as they both hold under the same landlord, who cannot derogate from his own grant.

Besides, the Defendant, as lessee, had no right to erect these buildings on the vacant land. The law is thus laid down by *Coke* (1): "If the tenant build a new house it is waste."

[The MASTER OF THE ROLLS:—That is not the law at the present time. In *Williams'* Notes on *Saunders* (2) it is said: "It is a question whether it is waste to build a *new* house." In *Lord*

(1) Co. Litt. 53 a. (2) Vol. ii. p. 652.

*Darcy* v. *Ashworth* (1) the law is thus stated: "A lessee may build a new house where none was before;" and thus in *Doe* v. *Earl of Burlington* (2): "Upon the whole, there is no authority for saying that any act can be waste which is not injurious to the inheritance, either, first, by diminishing the value of the estate, or secondly, by increasing the burthen upon it, or thirdly, by impairing the evidence of title. And this law is distinctly laid down by Chief Justice *Richardson* in *Barret* v. *Barret*" (3).]

As regards the question of nuisance, the evidence clearly shews that it is such as the Court will restrain, even though the Plaintiff is not the occupier of the houses, as its permanent value will be diminished. It appears that the Plaintiff's houses were let to weekly tenants, who are not in a position to file a bill in this Court; therefore, unless the Plaintiff can obtain an injunction, there will be no remedy whatsoever. The bill, therefore, is properly framed, and a sufficient case is made out to call for the interference of the Court.

Mr. *Southgate*, Q.C., and Mr. *Macnaghten*, for the Defendant.

SIR G. JESSEL, M.R.:—

I am satisfied this bill cannot be maintained. First, as regards the lights. The windows are not ancient lights, and as the lease under which the Defendant claims is prior in date to the Plaintiff's, the Plaintiff is precluded from claiming to be entitled to the lights in question under the well-known doctrine on which the bill appears to be founded, namely, that a landlord cannot derogate from his own grant.

But a very ingenious argument was addressed to me, namely, that although in truth the Defendant's lease was prior in date to the Plaintiff's, still the Defendant, by erecting these great buildings on the land, which are manifestly a great improvement in value to the property, is committing waste. Now, in my opinion, that is not proved. As I understand the law, the erection of buildings upon land which improve the value of land is not waste. In order to prove waste you must prove an injury to the inheritance. I

(1) Hob. 234 (ed. 1724). (2) 5 B. & Ad. 507, 517.
(3) Hetley, 35.

M. R. 1875 JONES v. CHAPPELL.

quite agree that it is not mere injury in the sense of value. You may prove an injury in the sense of destroying identity, by what is called destroying evidence of the owner's title, and that is a very peculiar head of the law, which has not been extended in modern times. In the lease in question, not only is there no covenant restraining the lessee from erecting buildings, but there is a covenant that he will keep all future buildings and erections in repair, shewing that the erection of buildings was contemplated. Therefore, so far as the lease goes, it is almost an implied license to erect buildings. But, independently of license, we must consider that if there had been waste at law, the landlord could, before the abolition of the action for waste, have brought an action or obtained an injunction, and that he would be entitled to the latter now if the injury were sufficiently serious. It is plain to my mind, looking at the nature of the works and at what the Defendant is doing, that the lessors could neither have done the one formerly, nor could they do the other now. In fact, I am satisfied it is not waste.

With reference to the authorities, the doctrine is so well laid down in *Doe* v. *Earl of Burlington* (1), that I do not think I need add anything further to it or to the modern expositions of the law on the subject. Therefore, even if it had been pleaded, I do not think that the Plaintiff is entitled to say that, because the Defendant has done an act which he could not have done lawfully without the license of the landlord, he is entitled to restrain it by injunction when the landlord has given him license. The argument should be carried a step further, and it should be alleged that the landlord has refused a license, and declined to interfere. But the owner in possession of property erecting a building of this kind does not commit an illegal act towards a stranger because somebody else might or might not have a right to stop it. There is no derivation of title under the same landlord in that sense at all. It does not appear to me that if the landlord had refused license, and there had been an act of waste, there is any compulsion upon the landlord to file a bill for an injunction, the action of waste being abolished, and he not being able now to recover possession of the premises by ejectment. The utmost he could do would be to file

(1) 5 B. & Ad. 517.

M. R.
1875
JONES
v.
CHAPPELL.

a bill for an injunction to restrain the Defendant from continuing the building.

Upon those grounds, therefore, it appears to me plain, so far as the substance of the case is concerned, as regards the light and air, that the bill cannot be maintained.

[His Honour then referred to the alleged nuisance arising from the noise occasioned by the Defendants' machinery.]

It appeared in evidence, as far as I could gather, that at the time when the bill was filed, but certainly shortly before, the two houses were let to weekly tenants, and they are both still so let and fully occupied. Now, as I understand the doctrine in *Simpson* v. *Savage* (1), the landlord in such a case cannot bring an action. The injury is a temporary nuisance, because the saws might be stopped and the steam-engine might cease working at any moment. It is only an injury to the occupier, and the landlord cannot bring an action, because before his estate comes into possession the nuisance may have ceased, or the person committing it may choose to make it cease the moment the estate comes into possession.

Another ground of action on the part of the landlord might be that the existence of a nuisance of a temporarary character would render it more difficult for him to let to a future tenant or to sell. But that is said not to be a good ground of action, because the theoretical diminution of the value of the property cannot be taken into account, inasmuch as the purchaser or the new occupier would have a right to stop the nuisance, so that he ought not to give less on that account than he otherwise would. It appears to me I am not able to overrule *Simpson* v. *Savage*, and that the principles upon which it was decided apply as much to weekly tenancies as to any other tenancies.

But then it is said that, if that is so, no relief at all can be obtained, and Mr. *Jason Smith* said that there was some doctrine of this Court by which a weekly tenant could not have an injunction. So far as I am aware, that has never been decided, but I should not find the slightest difficulty myself, if an occupier, being a weekly tenant, and his landlord were to join in a suit to restrain a nuisance, in granting them an injunction.

(1) 1 C. B. (N.S.) 347.

M. R. 1875 JONES v. CHAPPELL.

I can see no reason why a weekly tenancy may not continue from week to week quite as long as a yearly tenancy from year to year; because it is not a holding for one week, but it is a holding from week to week. I do not accede to the doctrine that a weekly tenant could not have an injunction to stop a nuisance which is injurious to his health and comfort, and prevents his residing in the rooms or house he may occupy. I am not aware of any decision to that effect, and I certainly should not be the first to make one.

[His Honour then referred to the evidence in the case, and dismissed the bill, but, with the Defendant's consent, without costs.]

Solicitors for the Plaintiff: Messrs. *Taylor & Son.*
Solicitors for the Defendant: Messrs. *Hargrove, Fowler, & Blunt.*

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M. R. 1875 *July* 15.

## FENWICK *v.* EAST LONDON RAILWAY COMPANY.

[1875 F. 76.]

*Railway Company—Erection of Mortar Mill—Nuisance—Injunction—Railways Clauses Consolidation Act*, 1845 (8 *Vict. c.* 20), *ss.* 16, 32.

12 L.D. 276-8
282-9,
20 C.L.D. 328

The words "purposes aforesaid," in sect. 32 of the *Railways Clauses Consolidation Act*, 1845, refer only to the purposes mentioned in that section. The remedy against the company in such cases may be by suit for injunction as well as by action for damages. An act is not "necessary" within the 16th section of the said Act, merely because it enables the company to execute their works more economically.

Where a railway company for the construction of their works erected a mortar-mill on part of their land close to the place of business of the Plaintiff, who complained of the injury and annoyance occasioned by the noise and vibration:—

*Held*, that the mortar-mill was not necessary for the construction of the line, and an injunction granted accordingly.

THE Plaintiffs carried on business as linendrapers in *Whitechapel*. The Defendants were constructing their line of railway at the rear and in the immediate neighbourhood of the Plaintiffs' premises, and had taken for the purposes of their railway a plot of land adjoining the Plaintiffs' shop and premises in the rear of the shop.

M. R. 1875

FENWICK v. EAST LONDON RAILWAY CO.

In January, 1875, the Defendants, who had previously excavated to a considerable depth for the purposes of their railway, erected a steam-engine and pump on the part of the land which was unexcavated. These were afterwards shifted nearer to the Plaintiffs' shop, causing considerable vibration, and on the 8th of June they began to construct a mill for grinding mortar within 10 ft. 6 in. from the east wall of the Plaintiffs' shop, and soon after commenced working it.

The bill alleged that the vibration and noise occasioned by the mortar-mill were such as to destroy the comfort of the Plaintiffs, and of the occupiers of the premises, and of the customers; that their manager and his wife, who resided in the house, were unable to sleep when the mortar-mill was going, and that the Plaintiffs' business would be most seriously injured unless the mill was removed or the working thereof stopped.

The bill prayed that the Defendants, their contractors, servants, workmen, and agents might be restrained from working the mortar-mill, steam-engine, and pump, so as to be a nuisance or injury to the Plaintiffs; and, secondly, that the Defendants might be ordered to pay to the Plaintiffs, in addition to or in substitution for the relief before prayed, such damages as the Court might think fit to award.

The Plaintiffs now moved for an injunction in the terms of the prayer of the bill, and affidavits were filed on their behalf which the Defendants had not an opportunity of answering. The nuisance complained of mainly related to the mortar-mill.

Mr. *Chitty*, Q.C., and Mr. *L. Field*, for the Plaintiffs, in support of the motion, referred to *Hammersmith and City Railway Company* v. *Brand* (1).

Mr. *Fooks*, Q.C., and Mr. *C. Browne*, for the Defendants:—

This is not a case in which the railway company can be restrained by injunction. By sect. 32 of the *Railways Clauses Act*, 1845, railway companies are empowered to take and occupy land so long as may be necessary for the construction of the railway or of the accommodation works, and to use the same for the various

(1) Law Rep. 4 H. L. 171.

M. R. 1875 FENWICK v. EAST LONDON RAILWAY CO.

purposes therein mentioned, and it provides that in exercise of the powers thereby given it shall be lawful for the company to deposit and also to manufacture and work up upon such lands materials of every kind used for constructing the railway, . . . . . and "for the purposes aforesaid" to erect thereon workshops, sheds, and other buildings of a temporary nature.

Under this section, coupled with the 16th section, I submit that the company is entitled to erect and to work their mortar-mill, which is a building of a temporary nature necessary for the railway works. The words "for the purposes aforesaid" cannot be limited to the specific purposes mentioned in the 32nd section, but must be taken to include other purposes previously mentioned in the Act.

Besides, in the 32nd section, the company is protected, so far as the present proceeding is concerned, by the words "provided always that nothing in this Act contained shall exempt the company from an action for nuisance or other injury,"—for those words limit the remedy of the aggrieved party to an action at law, and an action for a nuisance could not, at the time when this Act was passed, have an injunction combined with it.

Turning to the 16th section, we find words which completely cover the present case, for the railway company is thereby empowered to "erect such houses, warehouses, offices, and other buildings, yards, stations, wharfs, engines, machinery, apparatus, and other works and conveniences as they think proper." Now, taking the words "for the purposes aforesaid" in the 32nd section as including these powers conferred by the 16th, the Defendants are clearly authorized by the Legislature to erect the mortar-mill complained of. They are also empowered to do all other acts necessary for making, maintaining, altering, or repairing, and using the railway." The making of mortar for which this mill is worked is deemed by the company necessary for the works of the railway.

The nuisance, if any, in this case is only temporary; there is no structural injury to the Plaintiffs' house; there is nothing of the nature of the damage contemplated in sect. 68 of the *Lands Clauses Act*, so as to entitle the Plaintiffs to compensation.

Mr. *Chitty* in reply.

M. R.
1875
FENWICK
v.
EAST LONDON
RAILWAY CO.

SIR G. JESSEL, M.R.:—

The point I am going to decide is merely one of law. I have only had the affidavits read for the purpose of seeing if it was a case not for an *ex parte* injunction, but for an interim order, where the other side is served with notice and has not had an opportunity of answering the affidavits. I am clearly of opinion on the facts that, supposing the Plaintiffs are right as to the law, it is a case for that kind of injunction which is not strictly an *ex parte* injunction but which is very much like it. They give notice to the other side, they have not had time to answer, and therefore I shall give them an injunction, subject to what I am going to say, on the usual terms of an undertaking in damages, to restrain the working of this mortar-mill until the next motion day.

Mr. *Fooks* raises a point of law which is an extremely important one, and which, if I had been less familiar with the railway law than I am, I should have taken more time to consider, and heard more argument upon; but having entertained for very many years past certain views as to the construction of these sections, which I have acted upon in practice, I do not think it necessary either to hear further argument or to take time to consider.

The first point raised was that under the 32nd section of the *Railways Clauses Act*, the Defendants, the railway company, having erected this mortar-mill (I may confine my attention to that) for the purpose of making mortar to be used in the construction of their railway, were entitled to continue the working of that mortar-mill, notwithstanding any injury that might thereby be inflicted on the Plaintiffs.

As I read the 32nd section, that is not the true construction of it. The section empowers the company to take lands for what are generally called temporary purposes, and to use the same for the following purposes: "for the purpose of taking earth or soil by side-cuttings therefrom; for the purpose of depositing spoil thereon; for the purpose of obtaining materials therefrom for the construction or repair of the railway, or such accommodation works as aforesaid, or for the purpose of forming roads thereon." Not one of the purposes there mentioned is making mortar; consequently that is not within the purposes or in the exercise of the powers aforesaid. The section then provides that it shall be

M. R. 1875 FENWICK v. EAST LONDON RAILWAY CO.

lawful for the company to do various things upon such lands, such as depositing and manufacturing materials used in constructing the railway, and digging clay, stone, gravel, or sand, "and for the purposes aforesaid to erect thereon workshops, sheds, and other buildings of a temporary nature; provided always, that nothing in this Act contained shall exempt the company from an action for nuisance or other injury."

Mr. *Fooks* argued that "the purposes aforesaid" did not mean the purposes specifically mentioned in that section, but any other purposes mentioned in the Act, including the powers given by the 16th section.

First of all, I do not agree with him as regards grammar, because there are all sorts of intervening powers, as to which it is quite plain there are other limitations, and I think that these words refer to the purposes mentioned in the section, and not to those in preceding sections at all. As regards the 16th section there is an express limitation of those powers of a totally different character, as I shall have occasion to shew presently. Therefore I am of opinion that "the purposes aforesaid" mean the purposes mentioned in the 32nd section, and no other.

That, of course, would decide the question, but I think there is another observation to be made. The limitation is that "nothing in this Act contained shall exempt the company from an action for nuisance;" and Mr. *Fooks* argued that, even as regards the powers to which the section related, the limitation shewed that, though you might bring an action for nuisance, you could not have any other remedy. I decline to take so limited a view. "Action for nuisance" means the legal remedy for nuisance. In my opinion the word "action" there used, is not used in the limited sense of an action in a Court of Common Law, but it is used in the sense of any action a person may take, either to prevent the nuisance or to get damages for the nuisance, such as an action for damages.

Then there is another point which is exceedingly technical, but which I think is equally untenable. In an action for nuisance when this Act was passed the Plaintiff could not claim a writ of injunction, but can now; and it would be very absurd to say that if an injunction could now be obtained in a Court of Common Law because the company is not protected against an action for

nuisance, yet that the Legislature has prohibited this Court, which is the original one for issuing injunctions, from giving the same remedy. It would be a most startling conclusion. I am of opinion, therefore, that if Mr. *Fooks* was right as to the construction of the first part of the 32nd section, which I think he is not, he could not succeed under the proviso in the second part of the section.

Now, I must go back to the 16th section, under which, if at all, the company can do what is complained of. The 16th section is in terms a very wide section, and was intended to be wide. It allows the company, among other things, to "erect and construct such houses, machinery, apparatus, and other works and conveniences as they think proper." There is no limit as to their erection. But there is a limit to the user; "they may do all other acts necessary for making, maintaining, altering, or repairing and using the railway"—that is the user—"provided always that in the exercise of the powers by this or the special Act granted, the company shall do as little damage as can be, and shall make full satisfaction, in manner herein and in the special Act, and any Acts incorporated therewith, provided, to all parties interested for all damage by them sustained by reason of the exercise of such powers."

There is, therefore, a double limitation. They can only use the buildings and works referred to for purposes necessary, and they must do "as little damage as can be."

The first question is, what do the words "do as little damage as can be" mean? It is settled that "to do as little damage as can be" does not mean make the works without any damage, but refers to the mode of constructing and using those works. Upon that point there is the authority of *Reg.* v. *East and West India Docks Company* (1), where Lord *Campbell* says: "I ought to have said that I do not think the prosecutors can avail themselves of the proviso in the 8th & 9th Vict. c. 20, s. 16, that in exercise of their powers 'the company shall do as little damage as can be, and shall make full satisfaction.' I think that section does not apply to what is to be done in the execution of their powers, but to the manner of doing it." So that the Defendants could not succeed on the ground that they might erect their mortar-mill in some other part of the field or place, and thereby it would cause more damage.

(1) 2 E. & B. 474.

M. R. 1875 FENWICK v. EAST LONDON RAILWAY CO.

Then the question is, whether the limitation as to its being necessary applies, and I am of opinion that it does. It is not pretended that they cannot buy mortar, or get mortar elsewhere, or make it elsewhere. On that point there is authority also: *Reg.* v. *Wycombe Railway Company* (1). The question there was as to the diversion of roads under the same section, and Lord Chief Justice *Cockburn* says this (2): "Then comes the question whether the diversion of this road was necessary for the construction of the railway. Mr. *Keane* contended at first that it was necessary for the construction of the railway, because it was incumbent upon the company to construct the railway according to the plan, and this diversion had been marked upon the plan." It was a very strong case in that way, because they had actually marked it on the plan before they went to Parliament. "He did not with much force press this argument, and he ultimately gave it up. I am of opinion that it was entitled to no weight. The question is, was the diversion necessary for the formation and construction of the railway? Necessary it was, perhaps, in one sense, looking at the convenience of the company economically, but by no means necessary in any other point of view." This was exactly the case of the mortar; the company may buy mortar anywhere, but it may be cheaper and more convenient to them to make the mortar at this place. It is a much stronger case than the diversion of the road. "But we are not to look at the convenience of the company alone, but to the accommodation and convenience of those who have rights of property which are interfered with, of those who have immediate access to the road or who use it of necessity in the ordinary course of their business. It was not necessary for the construction of the railway that the road should have been permanently diverted; it might have been carried over the railway or under it; it was merely less expensive to the company to divert the road as they have done than to carry it over or under as they ought to have done, and as required by the Act of Parliament. I think that this return is bad. It alleges that it was necessary for the purpose of constructing the railway, that the road should be diverted, and that by virtue of the powers of their Act, and the Acts incorporated therewith, they did permanently divert the road The question whether that is true or not, turns entirely upon the

(1) Law Rep. 2 Q. B. 310. (2) Law Rep. 2 Q. B. 320.

construction to be put upon the term 'necessary,' in sect. 16. I think the meaning we ought to give to the word is, that it is only necessary for the construction of the railway to permanently divert the road, when the railway cannot be made without so diverting it."

The other judges agreed. Mr. Justice *Lush* makes this observation (1): "Obviously the sanction of Parliament to the diversion of public streets, roads, and ways is conditional upon its being necessary for the purpose of constructing the railway, and it never was intended to give to railway companies power arbitrarily to divert rivers, roads, streets, or ways, merely for the purpose of saving them the expense of building bridges over the railway. I read the words 'for the purpose of the construction of the railway' as importing this: when the railway is to interfere with a public road or street or river, so that the two cannot be used together, one must give way to the other, and then they have power to make such 'diversions or alterations in the roads, streets, or rivers as may be necessary in order the more conveniently to carry the same over or under or by the side of the railway as they may think proper.' Having power to divert or alter, they have the choice of doing it either by carrying it over or under or by the side of the railway; but that is only conditional on its being necessary to do it for the purpose of constructing the railway. There is not a word in the section intimating that they have this power merely in order that they may construct the railway more economically, or save expense to the company."

On the principle here laid down I have to be satisfied that the railway cannot be constructed without the mortar being made at this particular place.

I think the case is concluded by the authorities (I should have thought it would have been by good sense without authority), that you cannot damage your neighbour's property merely for the purpose of saving yourself a little money, where it is unnecessary for the construction of the railway; and there is a stronger reason in this case than in the one last referred to for holding this to be the true construction, because Mr. *Fooks* has pressed on me that the compensation sections do not apply. It is a case, he says, where there is no structural damage, and you could not come under

(1) Law Rep. 2 Q. B. 325.

M. R. 1875 FENWICK v. EAST LONDON RAILWAY CO.

the 68th section, and therefore, if he were right, they might do this injury to the Plaintiffs without giving them any compensation at all. That is an additional reason for holding them strictly to the terms of the Act of Parliament, that they must shew that it is necessary, in order to construct their railway, that they should inflict this damage on the Plaintiffs. It is quite clear that it is not, and I have no hesitation, so far as the law is concerned, in making the order, subject to the undertaking as to damages.

Solicitors for the Plaintiffs: Messrs. *Field, Roscoe, & Co.*

Solicitors for the Defendants: Messrs. *Wilson, Bristows, & Carpmael.*

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M. R. 1875 *July* 15.

## CHAMBERS *v.* GREEN.

*Writ of Prohibition—Mayor's Court—Application of Stranger—Jurisdiction—Discretion of Superior Court.*

When a writ of prohibition has been issued to restrain proceedings in the Mayor's Court on the application of a stranger to the suit, it cannot be sustained unless he can shew that the Court has exceeded its jurisdiction both with reference to the facts and the law, and then it is a matter of discretion with the superior Court whether or not to set it aside.

*Worthington* v. *Jeffries* (1) not followed.

THIS was a motion to set aside a writ of prohibition issued out of the Petty Bag Office of the Court of Chancery to restrain proceedings in the Mayor's Court.

The Plaintiff, *James Chambers*, carried on business as a tobacco broker in *Fenchurch Street*, within the city of *London*, and the Defendant, *John James Green*, also carried on business in the same street and within the City.

On the 23rd of April, 1873, *Green* called at the Plaintiff's office and bought by sample a case of cigars, the bulk of which were in bond at the *London Docks*, at the price of £136 4*s.* 1*d.*, including brokerage payable on delivery of order, and a bought note and invoice were made out accordingly.

Some time afterwards, *Green*, being unable to dispose of the cigars, requested *Chambers* to sell them for him, which he did, for the sum of £134 18*s.* 4*d.*, being £1 5*s.* 9*d.* less than the original

(1) Law Rep. 10 C. P. 379.

purchase-money. This case of cigars was then delivered to the sub-purchaser from the *London Docks*.

On the 17th of June, 1873, *Green* called again at *Chambers's* office, and bought by sample another case of cigars, also in bond at the *London Docks*, for the sum of £121 2*s*. 7*d*. These cigars were, by *Green's* order, delivered to a sub-purchaser named *Ward*, whose place of business was within the city of *London*.

On the 23rd of November, 1873, *Green* paid to *Chambers* the sum of £83 on account. On the 7th of January, 1874, *Chambers* sent in to *Green* an account shewing the balance due from him, and, the amount not having been paid, on the 8th of June, 1875, he made out a further account, shewing a balance of £79 12*s*. 4*d*., including interest, to be then due, and caused an action to be entered in the Mayor's Court for balance of account for goods sold and delivered by *Chambers* to *Green* for duty thereon and interest.

On the 18th of June, 1875, judgment was signed in the action for default of appearance, and execution issued.

On the 21st of June, 1875, the Defendant applied at the Mayor's Court for an order to set aside the judgment and execution on the ground that he had not been served with copy bill or other process, and it was ordered that on payment into Court by the Defendant of the amount of the levy under the execution and the expenses, the judgment signed against him by the Plaintiff, and all subsequent proceedings thereon, be satisfied.

On the 23rd of June, 1875, a writ of prohibition was, on the application of *John Wright*, the clerk to the Defendant's attorneys, issued out of the Petty Bag Office of the Court of Chancery, alleging that the cause of action in respect of the Plaintiff's claim against the Defendant did not, nor did any part thereof, arise or accrue within the city of *London* or within the jurisdiction of the Mayor's Court, and prohibiting the Plaintiff from further proceeding in the said action.

Mr. *Chitty*, Q.C., and Mr. *Grantham*, for the Plaintiff, in support of the motion to set aside the writ:—

This action was brought in the Mayor's Court for an account stated, though there appears to have been some irregularity in its

M. R. 1875 CHAMBERS v. GREEN

form. That however can, if necessary, be amended. If the action was for goods sold and delivered, as the contracts were both made within the City and the goods delivered within the City, except as to the small balance of £1 5*s.* 9*d.* due in respect of the first case of cigars, the whole cause of action may be said to have arisen within the city of *London*, and the Court will not take so trifling a sum into account when asked to set aside a writ of prohibition obtained by a stranger. This lies entirely in the discretion of the superior Court: *In re Forster* (1); *Mayor, &c., of London* v. *Cox* (2).

Mr. *Ince*, Q.C., and Mr. *L. E. Glyn*, in support of the writ:—

The writ of prohibition was in this case properly granted. The goods in question must have been taken to have been delivered to the sub-purchaser at the docks, and as the action was properly for goods sold and delivered, the cause of action was beyond the jurisdiction of the Mayor's Court. It may be said that part of the goods was delivered to a purchaser whose place of business was within the City; but that is not enough, for if the whole cause of action is not within the jurisdiction of the Mayor's Court, the writ of prohibition must stand. The jurisdiction of the Mayor's Court has been much restricted of late in consequence of the decisions of the Court of Common Pleas: *Cooke* v. *Gill* (3); *Robinson* v. *Emanuel* (4); *Worthington* v. *Jeffries* (5).

Mr. *Oswald*, for the Defendant *Green*.

SIR G. JESSEL, M.R., after stating the facts of the case, continued:—

There plainly was jurisdiction in the Mayor's Court, except as to the sum of £1 5*s.* 9*d.* The contracts were made in the City between persons carrying on business in the City, and the second box of cigars was brought up from the docks by the direction of the purchaser and delivered to a sub-purchaser within the City.

The law is well settled that when a stranger comes to a superior

(1) 4 B. & S. 187. 10 Jur. N.S. 254 (3) Law Rep. 8 C. P. 107.
(2) Law Rep. 2 H. L. 239. (4) Ibid. 9 C. P. 414.
(5) Law Rep. 10 C. P. 379.

Court for a writ of prohibition, he must shew that the inferior Court is exceeding its jurisdiction both in fact and law, and that it is a matter of discretion whether or not the superior Court shall set it aside. In the case of *In re Forster* (1), *Cockburn*, C.J., says: "I entirely concur in the proposition that, although the Court will listen to a person who is a stranger, and who interferes to point out that some other Court has exceeded its jurisdiction, whereby some wrong or grievance has been sustained, yet that is not *ex debito justitiæ*, but a matter upon which the Court may properly exercise its jurisdiction, as distinguished from a case of a party aggrieved, who is entitled to relief *ex debito justitiæ* if he suffers from the usurpation of jurisdiction by another Court."

The same point came indirectly before the House of Lords, in *Mayor, &c., of London* v. *Cox* (2), when *Willes*, J., after citing the passage from the judgment of *Cockburn*, C.J., in the case of *In re Forster*, which he adopted, added, "Such a discretion, once exercised, cannot be made the subject of review in a Court of Error."

In that view of the case eight Judges concurred.

On the other side there is the recent case of *Worthington* v. *Jeffries* (3), where it appears to have been held that, when a superior Court is clearly of opinion both with reference to the facts and the law that an inferior Court is exceeding its jurisdiction, it is bound to grant a writ of prohibition, whether the applicant is the Defendant below or a stranger.

Here we have the opinions of three Judges against eight, and I elect to follow the opinion of the greater number, which appears to be in accordance with common sense, and lays down the rule that when both parties to the action wish the inferior Court to decide it a stranger should not as a matter of course prevent it. I take this view, and hold that it is within the discretion of the superior Court, and in the exercise of that discretion I discharge the writ of prohibition with costs.

Solicitors for the Plaintiff: Messrs. *Rivington & Son.*
Solicitors for the Defendant: Messrs. *Crook & Smith.*

(1) 4 B. & S. 187, 199. (2) Law Rep. 2 H. L. 239
(3) Law Rep. 10 C. P. 379.

M. R.
1875
July 23.

## WEBB *v.* EARLE.

[1875 W. 156.]

*Company—Preferential Dividend—Payment of Arrears out of subsequent Profits.*

The directors of a limited company, under the authority of the articles of association, and with the sanction of a general meeting, issued preference capital carrying a dividend at £10 per cent. per annum, payable half-yearly :—

*Held*, on demurrer, that, if the profits of any year were insufficient to pay the dividend in full to the preference shareholders, the deficiency might be made good out of subsequent profits.

### DEMURRER.

The *West India and Panama Telegraph Company, Limited*, was registered under the *Companies Act*, 1862, on the 30th of July, 1870, with a capital of £650,000, divided into 65,000 shares of £10 each.

The 39th, 41st, and 95th articles of association provided as follows :—

39. "The directors may, with the sanction of a special resolution of the company previously given in a general meeting, increase the capital of the company by the issue of new shares, such aggregate increase to be of such amount, and to be divided into shares of such respective amounts, with such rights and privileges, or with such restrictions and on such terms and conditions as the company in general meeting directs, or, if no direction is given, as the directors think expedient."

41. "Any capital raised by the creation of new shares shall, unless otherwise directed by the resolution of the general meeting, be considered as part of the original capital, such new shares shall in every respect be subject to the same provisions with reference to the payment of calls, transfer, and forfeiture of shares on non-payment of calls or otherwise as if they had been part of the original capital."

95. "The directors may, with the sanction of the company at

the ordinary general meeting, declare a dividend to be paid to the members in proportion to their shares, and may also at their discretion declare an interim dividend at any rate not exceeding £10 per cent. per annum."

On the 17th of March, 1873, at an extraordinary general meeting held pursuant to notice, it was resolved: "That the capital of the company be increased by the issue of 25,000 new shares of £10 each, such shares being preference shares, with such amount of preferential dividend, and with or without a power of redemption on terms to be arranged, and with or without the option within a specified time of turning the preference shares into ordinary stock, and with or without such other rights and privileges, and with such restrictions, and to be issued at such price and on such terms and conditions as the directors of the said company may deem expedient, such shares to be offered to the members of the company in proportion to the number of existing shares held by them in pursuance of Article 40 of the articles of association."

The resolution having been duly confirmed, a letter, dated the 2nd of May, 1873, was addressed by the secretary to all the shareholders, inclosing a copy of the said resolution, stating the position of the company and containing the following paragraph:—

"The preference capital authorized is £250,000, carrying dividend at £10 per cent. per annum, payable half-yearly, and entitled to a *pro ratâ* participation in surplus dividends after £10 per cent. has been paid on the ordinary share capital of £650,000."

The new preference shares were offered to the existing shareholders, and were all allotted. A copy of the resolution, and of the terms of issue, as above stated, were indorsed on the share certificates.

On the 15th of June, 1874, at an extraordinary general meeting, it was resolved to increase the capital of the company by the issue of 10,000 new ordinary shares of £10 each, and 10,000 new second preference shares of £10 each, with cumulative preferential dividend at the rate of £10 per cent. per annum, to rank after the existing preference shares of £250,000.

Of the second preference shares £34,580 were allotted and subscribed for.

M. R. 1875 WEBB v. EARLE.

The bill was filed by the Plaintiff, the owner of fifty ordinary shares in the company, on behalf of himself and all other the ordinary shareholders in the company, except such of the Defendants as were ordinary shareholders, against certain of the first preference shareholders and one of the second preference shareholders (as representing the other preference shareholders of both classes) and the company, and after certain allegations (which, so far as material, have been hereinbefore stated) it alleged as follows:—

That the revenue account furnished for the year ending the 30th of September, 1873, shewed a balance only of £5690, which it was considered necessary to apply to the reserve fund, and was so applied; but the accountants of the company, with the privity and consent of the directors and the Defendants, the preference shareholders, placed "to the credit of the preference shareholders in suspense" the amount of the dividend on the calls paid by them to the 30th of September, 1873:

That in the balance sheet of the directors up to the 31st of December, 1874, there was a balance in favour of the company of £2925, which was carried to the general reserve account, but that the directors, although there were no profits available for division, had in their account credited "the preference shareholders in suspense" with the sum of £36,682 first preference unpaid dividends, being a dividend which they alleged to be applicable to the shares of the first of the said issues of preference shares, and the sum of £445, which they alleged to be applicable to the dividends on the second issue of preference shares:

The bill prayed that it might be declared that the Plaintiff, representing the ordinary shareholders of the company, was entitled in every year to receive a dividend on his shares after the preference shareholders under the first of the issues hereinbefore mentioned had been paid £10 per cent. for the year in question, and the preference shareholders under the second issue had received £10 per cent. for the current and previous years; and that the preference shareholders under the first issue were not entitled to make up the deficiency or failure of any previous year out of the dividends of the current years.

The Defendants demurred to the Plaintiff's bill for want of equity.

Mr. *Davey*, Q.C., and Mr. *Romer*, for the Defendants, in support of the demurrer :—

This bill cannot be sustained. The articles of association referred to in the bill fully authorized the resolution of the general meeting, and, there being nothing to limit the preferential dividend to the profits of the current year, the directors were acting within their powers in carrying a portion of the profits of a subsequent year to the account of the dividend of the preference shareholders for the year when the profits were insufficient to make up the guaranteed £10 per cent.

The case is governed by *Henry* v. *Great Northern Railway Company* (1). In that case preference shares in the company had been issued under Parliamentary authority, and the resolution for issuing them provided that they should bear a preferential dividend at a fixed rate, and it was held that if the profits at any period of distribution were insufficient to pay in full the dividends due to the preference shareholders, the arrears must be paid out of subsequent profits. The same principle was followed in *Corry* v. *Londonderry and Enniskillen Railway Company* (2); *Sturge* v. *Eastern Union Railway Company* (3); *Crawford* v. *North-Eastern Railway Company* (4); *Coates* v. *Nottingham Waterworks Company* (5).

Mr. *Hastings*, Q.C., and Mr. *E. Cutler*, for the Plaintiff, in support of the bill :—

The resolution of the general meeting under which the preference shares were created must be controlled by reference to the articles. By Article 41, the dividend on the preference shares was not to exceed £10 per cent. per annum. This cannot be taken as giving the preference shareholders a right to have their back dividends made good out of subsequent profits to the detriment of the ordinary shareholders.

[They referred to *In re London India Rubber Company* (6).]

SIR G. JESSEL, M.R.:—

I am of opinion that the Defendants are right. The words are

(1) 1 De G. & J. 606. (4) 3 K. & J. 723.
(2) 29 Beav. 263. (5) 30 Beav. 86.
(3) 7 D. M. & G. 158. (6) Law Rep. 5 Eq. 519.

M. R. 1875 WEBB v. EARLE.

very simple. The resolution authorized the capital of the company to be "increased by the issue of 25,000 new shares of £10 each, such shares being preference shares, with such amount of preferential dividend, and with or without a power of redemption on terms to be arranged, and with or without the option within a specified time of turning the preference shares into ordinary stock, and with or without such other rights and privileges, or with such restrictions, and to be issued at such price and on such terms and conditions as the directors of the said company may deem expedient." Consequently these shares must be part of the capital entitled to preferential dividend, whatever that may mean.

Then the directors exercise the power by a contract by letter. The preferential capital authorized is £250,000, carrying dividend at £10 per cent. per annum, payable half-yearly, and entitled to a *pro ratâ* participation in surplus dividends after £10 per cent. has been paid on the ordinary share capital of £650,000.

Now it has been said in *Henry* v. *Great Northern Railway Company* (1), that there is no magic in the word "dividend"; it may be interest, or it may be an aliquot proportion of dividend, or it may be the dividend itself, that is, the fund to be divided,—what it means can only be decided by looking at the words used in the case in question. Here the shareholders are told that the new capital carries dividend at the rate of £10 per cent. per annum, payable half-yearly. What, then, does "dividend" here mean?

When you look at the resolution, articles, and letter together, it clearly means this, that the dividend on the preference shares is to be paid out of the dividend declared, if there is one,—in other words, that the right is restricted to this, that it is to be paid out of what is declared so far as it will go, and that the preference shareholders cannot get any more, and that they cannot get it when there is no dividend declared. They are to have it if there is anything to pay; if there is nothing to pay they are to go without until there is something to pay; but it does not mean that if there is not enough to pay one half year they are not to have it the next half year, or the third or fourth or fifth half year.

The case is exactly the same as that put by Lord Justice *Knight Bruce* in *Henry* v. *Great Northern Railway Company* (2), from

(1) 1 De G. & J. 606. (2) 1 De G. & J. 643.

M. R.
1875
WEBB
v.
EARLE.

which this case, in my opinion, is not fairly distinguishable. He says this: "*A.*, *B.*, and *C.* are partners in a trade, each having contributed an equal share of capital, but they agree that out of the profits £5 per cent. per annum shall preferably, and in the first instance, be paid to *A.* on his portion of the capital. The division of the profits among them is agreed to be and is periodically made. At one of the periodical divisions the profits fall short of a sufficiency to pay this amount to *A.*, from the time to which out of the profits his interest had previously been paid. Is the deficiency not afterwards to be made good to him from profits more than adequate to answer it? I have heard no reason why not."

It really comes to nothing more than that. The preference shareholders are to have a dividend of £10 per cent. per annum, but it is to be paid as on preference capital, that is, so far as the profits shall extend; there is nothing to prevent them going to the profits of a subsequent period when they are sufficient to make it up. I therefore allow the demurrer.

Solicitors for the Plaintiff: Messrs. *Farrer, French, & Tatham.*
Solicitors for the Defendants: Messrs. *Bircham & Co.*

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## *In re* CULL'S TRUSTS.

M. R.
1875
*July* 31.

*Trustees Relief Act—Payment into Court—Costs.*

The trustees of a trust fund to which their *cestui que trust* has become entitled in default of appointment by a tenant for life, are justified in paying it over to him on being informed in writing by the solicitor to the parties that he has reason to believe that no appointment has been made; and would be free from liability in doing so.

Trustees who under such circumstances pay the trust fund into Court under the *Trustees Relief Act* will not, as a rule, be entitled to their costs.

*In re Wylly's Trusts* (1) explained.

THIS was a Petition by *Richard Cull*, for the payment to him of a trust fund which had been paid into Court under the *Trustees Relief Act.*

(1) 28 Beav. 458.

M. R.
1875
*In re* CULL'S TRUSTS.

By a settlement made on the Petitioner's marriage, certain trust property was settled in trust for the Petitioner's intended wife for her life, for her separate use, and, if she should die in his lifetime, then in trust for such person and for such purposes as she should by her will or by deed appoint; and in default of such appointment in trust for the Petitioner absolutely.

Mrs. *Cull* died on the 1st of December, 1874, and without having, so far as appeared, exercised her power of appointment by deed. At the time of her death the property subject to the trusts of the settlement consisted of the sum of £1010 3*s.* 10*d.* Consols, the dividends on which had been paid to her or to the Petitioner by her direction.

The Petitioner, after his wife's death, applied to the then trustees, the executors of the last surviving trustee of the settlement, for a transfer of the stock; they did not, however, comply with his request on the ground of the possibility of Mrs. *Cull* having exercised her power of appointment, whereupon the solicitors who acted for Mr. and Mrs. *Cull* wrote to the solicitor of the trustees as follows:—

"Mrs. *Cull*, to the best of our knowledge, since her marriage never employed any solicitors but ourselves, and we believe there is not the slightest ground for supposing that any appointment ever took place, nor had the trustees notice of any. The settlement has always remained in our office. We are quite willing to satisfy you as to any explanation you may require, and to give a statutory declaration to that effect, and one by Mr. *Cull* also. We object to the trust fund being paid into Court."

The solicitor of the trustees took the opinion of an eminent conveyancer on the question referred to, and he advised that, though funds were constantly paid by trustees to *cestuis que trust* under similar circumstances, yet, if the trustees desired to do so, they would be justified in paying the money into Court, and would be allowed their costs: *Re Wylly's Trusts* (1); and the more so that they were not strictly trustees, but executors of a surviving trustee. He then stated the evidence which the trustees should require if they did not pay the money into Court.

(1) 28 Beav. 458.

The trustees thereupon transferred the trust fund into Court, and this Petition was now presented praying for its transfer to the Petitioner, and that the trustees might be ordered to pay the costs of the transfer into Court, and of the present application.

Mr. *Chitty*, Q.C., and Mr. *Millar*, for the Petitioner.

Mr. *Ince*, Q.C., for the trustees:—

Where trustees entertain *bonâ fide* doubts as to the persons entitled to a trust fund, they are justified in paying it into Court: *In re Lane's Trust* (1). In this case they were advised by an eminent counsel that they might properly pay the money into Court, on the authority of *Re Wylly's Trusts* (2), and, even if they have acted with extreme caution, it is not a case in which they should be made liable for the costs.

SIR G JESSEL, M.R.:—

If there had been no such case as *Re Wylly's Trusts*, and no such opinion as that referred to, I should probably have made the trustees pay the costs of the transfer of the fund into Court. They had no notice of any appointment by the lady, and no ground for believing that any appointment had ever been made. The solicitors who had acted for Mrs. *Cull* from the time of her marriage wrote to say that there was not the slightest ground for supposing that she had made any appointment. The trustees had, therefore, fully discharged their duty, and I am of opinion that they could not have been made liable if they had then paid over the fund to the Petitioner, even if an appointment had been subsequently discovered.

In the case of *Re Wylly's Trusts* the late Master of the Rolls said: "The trustees had a right to satisfactory evidence that Mrs. *Wylly* had made no appointment of the fund," by which, I understand him to mean such evidence as a conveyancer would require. A letter from the solicitor in such a case would be quite sufficient; some practitioners require a statutory declaration, but it is superfluous. I do not understand that the Master of the Rolls

(1) 24 L. T. (O.S.) 181. (2) 28 Beav. 458.

M. R. 1875 *In re* Cull's Trcsts.

intended more, otherwise in every case trustees would have to pay the money into Court, and Lord *Romilly's* judgment does not warrant any such conclusion.

But though I think it is quite clear, yet as the point does not appear free from doubt or ambiguity to other minds, I do not think that I shall make these trustees, who have acted with such over-caution, in this, the first case of the kind that has come before me, pay the costs of the transfer into Court; but I wish it to be understood that the next set of trustees who come before me having so acted must pay the costs. There will be no costs of the present application.

Solicitors for the Petitioner: Messrs. *Smith, Stenning, & Croft.*
Solicitor for the trustees: Mr. *Wynne E. Baxter.*

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M. R. 1875 *July* 3.

## BERESFORD *v.* BROWNING.

[1861 B. 303.]

## BROWNING *v.* BERESFORD.

[1861 B. 302.]

*Partnership—Agreement as to Payment by Surviving Partners of Deceased Partner's Share—Joint and Several Liability.*

4 Ch. App. Cas. 309

By an agreement between *A.*, *B.*, *C.*, and *D.*, four partners in a mercantile business, after reciting, amongst other things, that all the partners had considerable sums of money employed in the business as floating capital, which it might be impracticable or highly detrimental for the others of them to repay or advance from the said business immediately after the retirement or decease of either of them, it was agreed between and by *A.*, *B.*, *C.*, and *D.*, that in case of either of them retiring from the co-partnership business, or departing this life during the continuance thereof, then and in such case the continuing or surviving partners or partner should not be compelled by such retiring partner, or by the executors or administrators of such deceased partner, to repay to him or them his or their share in the said co-partnership business immediately, but the clear balance, as ascertained from the last stock-taking, due to such retiring or deceased partner, together with any additional capital (if any), should be repaid out of the business by the continuing or surviving partners by instalments, as therein mentioned, until the whole amount should be fully paid or discharged, unless the surviving or

continuing partners should wish to pay such share or balance at an earlier period, which they were to be at liberty to do:—

*Held*, that the agreement was merely an arrangement as to the mode of discharging a pre-existing joint and several liability, and was not intended to alter the nature of the liability:

*Held*, further, that if the agreement did create a new liability, such new liability arising out of a contract by a mercantile partnership was in equity several, and not joint merely.

Affirmed 2 R. & L. Rep. 30 C. R.

ON the 20th of February, 1855, an agreement was entered into between *James Browning*, *William Browning*, *Henry Browning*, and *Francis Browning*, which was as follows:—

"Whereas the said parties hereto, together with *William Hardwick Browning*, now deceased, did previous to his death, and the said parties hereto have since that event continued to carry on business together as oil merchants in co-partnership, and an agreement dated the 10th day of November, 1852, was entered into between and signed by them, and which agreement defined the proportions of their respective interest in the said business; and whereas it is now understood and agreed between and by the said parties hereto that from and after the first day of January, 1853, the profits of the said business, after deducting all outgoings, rents, and other expenses, should be divided between them in the portions after stated, and that this agreement shall be considered as the basis of the partnership in continuation of the before-mentioned agreement; Now, therefore, in consideration of the premises and of the said co-partnership, and of the mutual engagements between them, before and hereinafter mentioned, It is hereby agreed by and between them the said *James Browning*, *William Browning*, *Henry Browning*, and *Francis Browning*, that they shall henceforward continue in co-partnership in the said business of oil merchants in, by, and under the name, style, and firm of *James, William, & Henry Browning & Co.* And also that after payment of the rents hereinafter agreed on and specified, and interest of capital belonging to each other employed in the said business, and all other outgoings and expenses of the said business, the clear profits of the said business shall be divided between them from time to time in the proportions following: four twelfth parts thereof to the said *James Browning*, three twelfth parts

M. R. 1875 BERESFORD v. BROWNING. — BROWNING v. BERESFORD.

thereof to the said *William Browning*, three twelfth parts thereof to the said *Henry Browning*, and two twelfth parts thereof to the said *Francis Browning*. And also that they shall continue to carry on the said business at the above-mentioned house, No. 113, *St. John Street*, and the yard and warehouses at the back thereof, formerly the *Windmill Inn Yard*. And also that the business shall pay the rent as heretofore, and all taxes, rates, assessments, and charges whatsoever, whether parliamentary, parochial, or otherwise, which during the continuance of the said co-partnership shall be taxed, rated, charged, assessed, or imposed on the said premises or any part thereof. And also clerks and servants' wages, coals, and lights, as heretofore paid out of and borne by the said co-partnership business before the said division of profits. And whereas the said *J. Browning* and all other the said parties have considerable sums of money employed in the said business as floating capital, which it might be impracticable or highly detrimental for the others of them to repay or advance from the said business immediately after the retirement or decease of either of them, Now, therefore, it is further agreed between and by the said *J. Browning* and *W. Browning*, *H. Browning* and *F. Browning*, that in case of either of them retiring from the co-partnership business, or departing this life during the continuance thereof, then and in such case the continuing or retiring partners or partner shall not be compellable by such retiring partner, or by the executors or administrators of such deceased partner, to repay to him or them his or their share in the said co-partnership business immediately, but the clear balance as ascertained from the last stock-taking due to such retiring or deceased partner, together with any additional capital (if any), shall be repaid out of the business by the continuing or surviving partners in manner following (that is to say): the sum of £2000 and interest at £5 per cent. per annum on the whole sum which shall be found due shall be paid at the end of one year from such retirement or decease as aforesaid, and the like sum of £2000 shall be paid at the end of each next succeeding year with interest at £5 per cent. as aforesaid on the balance of the capital, until the whole amount shall be fully paid and discharged, unless the surviving or continuing partners should wish to pay such share or balance at an earlier period, which they

are to be at liberty to do. Lastly, it is understood and agreed that upon the death of either of the said parties during this co-partnership, the last stock-taking of the said firm shall be conclusive as to the share or amount of interest of the deceased partner in the said business, and shall be the sum to be paid to his executors, in the proportions and at the times before-mentioned, as in the case of retirement of any partner, with interest thereon from the date of such stock-taking at the rate of £5 per cent. per annum in lieu of profits from that time, and without any deduction in respect of bad debts (if any) to accrue between the time of such stock-taking and the day of the decease of such partners so dying as aforesaid: provided always, and it is hereby expressly agreed and declared, that in case at the time of the death of either of the said parties to these presents, the stock shall not have been taken in the usual manner at the end of the month of June or during the following July, or the same having been taken shall not have been duly made up and signed by the said parties hereto, or a majority of them, on or before the 31st day of December following, or afterwards by all of them, that then, in the event of decease of either of the said partners between the 31st day of December and the 30th day of June following, the stock shall be taken afresh, and the executors or administrators of the deceased partner shall be entitled to his share of the profits of the said business from the then last proper stock-taking, such share to be duly ascertained and the amount of the share of the deceased partner shall be paid to the executors of the deceased partner at the times and in the proportions before mentioned; but in case in the event of the decease of either of the said partners between the 30th of June and the 31st day of December in any year, the stock having been previously duly taken at the usual time, but not carried out into the books and signed, the surviving partners shall be allowed thirty days from the day of the deceased partner's death to complete the stock-taking, and the executors of the deceased partner shall be bound thereby, and in default of the surviving partners so completing such stock-taking so taken, but not carried out as aforesaid within the said space of thirty days, then the stock shall be taken entirely *de novo* as from the last proper stock-taking duly entered in the books as before provided for, and the executors of

M. R. 1875

BERESFORD v. BROWNING.

BROWNING v. BERESFORD.

the deceased partner entitled to his share of the profits to his death, and to be paid as before provided for."

*James Browning* died on the 22nd of April, 1861, intestate. These suits were instituted for the purpose of administering his estate and taking the partnership accounts. A decree was made in both suits, and under an inquiry thereby directed it was ascertained that the sum of £64,784 15*s.* 7*d.* was due from *William Browning*, *Henry Browning*, and *Francis Browning*, in respect of *James Browning's* capital in the said business, and this sum was payable with interest at £5 per cent. by instalments of £2000, payable on the 22nd of April in each year. By the order made on further consideration, it was ordered that *William Browning*, *Henry Browning*, and *Francis Browning*, or the survivors of them, should pay the said instalments to the legal personal representative of the intestate within one calendar month after the 22nd of April in each year.

*Henry Browning* died on the 3rd of November, 1871, and *William Browning* on the 9th of March, 1872.

The instalments were regularly paid down to and inclusive of the instalment which became due on the 22nd of April, 1874. On the 3rd of May, 1875, *Francis Browning*, being unable to pay his debts, instituted proceedings in the Bankruptcy Court for liquidation of his affairs by arrangement.

Under these circumstances the present Petition was presented by the legal personal representative of the intestate, for the purpose of raising the question whether recourse could be had to the estates of *Henry Browning* and *William Browning* for payment of the instalments due and to become due; and it was arranged that this question should be argued and decided on the present Petition without the institution of any supplemental suit.

Mr. *Chitty*, Q.C., and Mr. *Ingle Joyce*, for the Petition:—

This is an agreement between the partner who first dies and the three partners surviving at the time as to the mode of payment of a debt due from the three surviving partners. The debt is a partnership debt, and is therefore *primâ facie* a several debt in equity, and there is nothing in the agreement to convert it into a joint debt. The burden of shewing that it is a joint debt lies on those

who say it is such. Even at law such an agreement would be construed as several: *Sorsbie* v. *Park* (1).

Mr. *Marten*, Q.C., and Mr. *Grosvenor Woods*, for parties in the same interest.

Mr. *Horton Smith*, for *Francis Browning*, referred to the cases cited in *De Gex* and *Horton Smith* on Creditors' Deeds (2), and *Lindley* on Partnership (3).

Mr. *Waller*, Q.C., and Mr. *Bunting*, for the representatives of *Henry Browning*:—

First, there is no personal liability to pay; the only agreement is that the share of the deceased shall be "repaid out of the business."

[The MASTER OF THE ROLLS:—Does that make any difference? The three have received assets more than enough to pay the debt. Must they not pay?]

Next, we say that the liability was joint, not several. No doubt the ordinary liability of a partner in a trading firm to an outside creditor is in equity several as well as joint: *Liverpool Borough Bank* v. *Walker* (4); but this is not the case of an outside creditor. The agreement is made for the purpose of regulating the rights of the partners *inter se;* and these rights must be governed exclusively by that agreement, which only creates a joint liability on the surviving partners. "In equity, if several persons contract a debt, they are not only jointly, but also severally, liable to repay it, unless their obligation is created by some instrument which in terms imposes upon them a joint obligation only:" *Lindley* on Partnership (5).

[The MASTER OF THE ROLLS:—If that is meant to apply to persons who are not partners, I should hesitate to accept it. His Honour referred to *Thorpe* v. *Jackson* (6); *Jones* v. *Beach* (7); *Other* v. *Iveson* (8).]

(1) 12 M. & W. 146.
(2) Page 107.
(3) 3rd Ed. p. 384.
(4) 4 De G. & J. 24.
(5) 3rd Ed. p. 382.
(6) 2 Y. & C. (Ex.) 553.
(7) 2 D. M. & G. 886.
(8) 3 Drew. 177.

M. R.
1875
BERESFORD v. BROWNING.
BROWNING v. BERESFORD.

In the same work it is said (1), "It must not be supposed that in equity every liability contracted by partners is several as well as joint. It is a question of intention on the part of the firm and on the part of those with whom it deals. If, therefore, partners enter into a contract binding themselves jointly and not severally, and if such contract is not a mere security for the payment of a pre-existing debt, or for the performance of a pre-existing joint and several obligation, and if it has not been made joint in form by mistake, the effect of the contract will be in equity, as in law, to impose a joint obligation, and no other."

[The MASTER OF THE ROLLS:—That does not help you, because here there was a pre-existing obligation. Besides, there are cases in which a partnership may incur a several liability under an instrument joint in form, although there is no pre-existing obligation: as, for example, by giving a joint promissory note.]

The case is governed by *Sumner* v. *Powell* (2); *Wilmer* v. *Currey* (3); *Clarke* v. *Bickers* (4).

Mr. *Hastings*, Q.C., and Mr. *Abraham*, for other Respondents.

Mr. *Chitty*, in reply, cited *Buckley* v. *Barber* (5); *Devaynes* v. *Noble* (6); and submitted that the agreement did not vary the pre-existing liability, but only the mode of satisfying it.

SIR G. JESSEL, M.R.:—

The question in this case has taken a very great deal of time in discussion, but the point is really a very simple one. Four persons were in business as oil merchants. They came to an agreement to regulate the mode of paying out the share of any one who should die or retire. That agreement is dated the 20th of February, 1855, and is as follows:—[His Honour read the material part.] It is noticeable that the agreement speaks of the share in the co-partnership business, which is, of course, a share of the capital. It is to be repaid out of the business "by the continuing or surviving partners in manner following;" and then the instal-

(1) Page 384.
(2) 2 Mer. 30; T. & R. 423.
(3) 2 De G. & Sm. 347.
(4) 14 Sim. 639.
(5) 6 Ex. 182.
(6) 2 Russ. & My. 495.

ments are mentioned of £2000 a year. Then there is an agreement that upon the death of any one the last stock-taking shall be conclusive as to his share of capital, and he shall get interest at £5 per cent. Then there is a proviso that if there shall be no stock-taking, it shall be taken after the death in the way there mentioned for ascertaining the share.

The first thing to consider is, what was the position of the parties when this agreement was entered into, and what would be their position when one died. Of course, it was wholly uncertain which would die first, or which would retire first. The allegation is that it would be impracticable or highly detrimental for the others to repay or advance from the business the sum in question immediately. Therefore the object of the parties was to avoid detriment to the others. It has been agreed on all hands, and I think rightly, that when you come to look at the form of this agreement, it was not merely an agreement for providing for the payment of the share of the capital belonging to the deceased or retiring partner, but was also impliedly an agreement that the remaining partners, whether continuing or surviving, should carry on the business. On the clause, as I read it, it did not impose any definite term, although even that is open to argument. That being so, what is the meaning of the arrangement? It means this: the surviving or continuing partners are liable by law to pay immediately; they are to have time, and to pay by instalments. The surviving or continuing partners are liable by law to pay the actual value of the share of the dead or retiring partner at the time of the dissolution: that is inconvenient; and they say we will adopt the last stock-taking, not as a new amount, but as fixing the amount, instead of taking the account over again, and if that is not possible, then we will have a new stock-taking at a subsequent day. In neither case will we take the exact mode of ascertaining the amount payable, but we will vary the mode so as to make it more convenient. The arrangement is nothing more or less than providing for the payment of the share of the deceased partner (for I confine my observations now to a dead partner), by altering the date of payment and the mode of taking the account. It does not in substance vary from what the law would have prescribed, except in those two particulars. It

M. R. 1875

BERESFORD v. BROWNING.

BROWNING v. BERESFORD.

is, in fact, a mode of regulating the payment of a debt rather than the creation of a new one.

Now upon that point I think there is plenty of authority, if authority were wanting. In the case of *Bishop* v. *Church* (1) a joint bond was given. Of course a new day of payment was in the joint bond, but no one suggested, because you varied the day of payment, that made it a new debt, that is, you were not to look to the consideration for the bond, and in fact it was decided that the consideration of the bond being a partnership debt, the obligation created by the joint bond was not joint only, as it was at law, but joint and several in equity. I do not think in any of the cases the mere fact of the variation in time of payment has been considered material for this purpose.

But is it material to consider whether the variation in the mode of taking the account makes any difference? I should say certainly not. The mode adopted by the Court of Equity is exceedingly inconvenient. You actually sell and realize everything, and break up the partnership business, so to say, before you can ascertain what is due. The very object of the partners was that this should not be done. Some other mode of valuing, therefore, must be adopted, some kind of valuing instead of actual sale. They take the valuation made by the partners themselves immediately before the event happened, or if none such, then at the last stock-taking. That is evidently only another mode of ascertaining what is due, a more convenient mode, and one which suited their object, which was to continue the partnership business. But it is mere modification—it is not a new liability created; it is a mode of ascertaining the amount and extent of the liability, and a more convenient mode also of securing its payment. My view of the instrument is that it was not intended to effect anything more; that it was in reality nothing but an arrangement as to the mode of discharging a pre-existing liability.

If that view is correct, it is hardly necessary for me to consider whether at law an action could have been maintained against each of the surviving partners separately, or whether they must all have been joined as Defendants in the same action; because it is quite clear that in equity the original liability was joint and several.

(1) 2 Ves. Sen. 100, 371.

No one doubts for a moment that the liability of the three surviving partners who have taken possession of the partnership assets to account to the executor of the deceased partner is not destroyed by the fact of two of those surviving partners dying before the account is taken. In fact, the phrase describing the nature of that equity is now too familiar to all of us to suppose that any one ever doubted such a proposition.

Consequently, at the time when this new arrangement was made, there was, or, more properly, there would be, on the surviving partners a joint and several liability to pay out the share of the deceased partner, and the arrangement was that this joint and several liability should be altered in point of time, and should be altered in point of ascertainment of its amount, and nothing more. Therefore it appears to me that this is a joint and several liability.

With regard to the actual legal question, I say it is not necessary to decide. Were it necessary, I should say I can find nothing in this agreement to make it joint; but it is as well to consider one or two of the authorities which have been cited for the Respondents, and which, it is said, shew where you take a security for the payment of a partnership liability, and that security is in form a joint one, that it destroys the several liability which exists in equity.

It is very difficult to say exactly how the doctrine came into our law. I see that Sir *William Grant*, in the case of *Devaynes* v. *Noble, Sleech's Case* (1), assumes it came into our law from the law merchant, and if so, it would be confined to the case of a mercantile partnership. He says (2): "It may be proper, however, to observe that the common law, though it professes to adopt the *lex mercatoria*, has not adopted it throughout in what relates to partnership in trade." Then he goes on to say: "whereas I apprehend, by the general mercantile law, a partnership contract is several as well as joint." I am not going to say this Court has extended that doctrine to all partnerships. It is not necessary to decide that now. But the law, as laid down by Sir *William Grant*, has never been questioned that it certainly extends to all mercantile partnerships. There all partnership contracts are

4 Coff Cas 369

(1) 1 Mer. 539. (2) 1 Mer. 564.

M. R. 1875

BERESFORD v. BROWNING.

BROWNING v. BERESFORD.

several as well as joint. Such a contract must be a partnership contract entered into by mercantile parties, and of course for partnership purposes, otherwise it would not be a partnership contract.

I have found no case at all against that authority. In *Sumner* v. *Powell* (1), which was decided by the same Judge and in the same year as *Sleech's Case* (2), there was a mercantile partnership. The new partner who was taken in by the surviving partners agreed to indemnify the executors of the deceased partner from a breach of trust committed by the old firm, but at the same time the whole of the share of the deceased partner was paid out to the legal personal representative. That is very material; for it follows that, independently of the contract itself, there was no liability on the part of the surviving partners to indemnify the estate of the deceased partner. But, in addition to paying him the whole of his share irrespective of the breach of trust, as to which they would have been entitled to contribution, they also agreed, together with the new partner, to indemnify his estate from the consequences of the breach of trust. That, therefore, was an entirely new contract, quite irrespective of the then existing liability; and, as the covenant was joint, Sir *William Grant* did not see any reason for making the new contract wider in its terms than it professed to be, the liability being merely a creation, so to say, of the agreement or deed itself. But, in addition to that, you have this, that the contract with the new partner to pay the antecedent liability was not for a partnership debt at all. It was not a partnership debt of the partnership, in which he was a partner, it was a partnership liability of the old firm in which he was not a partner; so that the agreement, which was a joint agreement, not merely by the surviving partners, but by themselves and the new partner, was not an agreement by partners to pay a partnership liability. It came under another category. That Sir *William Grant* so considered it is plain from his judgment. He says, after referring to the late case of *Devaynes* v. *Noble*, which I cited first (3): "When the obligation exists only by virtue of the covenant, its extent can be measured only by the words in which it is conceived. A partner-

(1) 2 Mer. 30.

(2) 1 Mer. 539.

(3) 2 Mer. 36, 37.

ship debt has been treated in equity as the several debt of each partner, though at law it is only the joint debt of all. But there all have had a benefit from the money advanced or the credit given, and the obligation to pay exists independently of any instrument by which the debt may have been secured. So where a joint bond has, in equity, been considered as several, there has been a credit previously given to the different persons who have entered into the obligation"—referring to *Bishop* v. *Church* (1), and that class of cases. He evidently there does not consider the fact of the bond being at a future day would make any difference at all.—"But in this case the covenant is purely matter of arbitrary convention growing out of no antecedent liability in all or any of the covenantors to do what they have thereby undertaken. Instead of winding up the partnership concern, and dividing what might remain after satisfying all claims upon it, the parties make an arrangement by which Mr. *Sumner* was immediately to receive what was estimated to be his testator's share of the joint estate, he releasing to the other partners all interest in the residue. Why was Mr. *Sumner's* share of the partnership estate to remain unaffected by any claims by which that estate might afterwards be diminished? There was no equity that entitled him to demand from the other partners an engagement to that effect. But they are contented to give him a covenant of indemnity. As it is only a joint covenant that is given, how can I say that it is anything more than a joint covenant that was meant to be given?" He does not deal with the other point, which was not argued before him, and say whether the covenant was such as to make it a new agreement by the new partner. The answer would have been, that is not a partnership contract for something the partnership has received, for the new partnership had never received anything. It was an indemnity against a liability as to which the old partners had actually paid out the share to the executors of the deceased partner. It was giving him something over and above that to which he by law, or rather equity, was entitled.

It appears to me, therefore, that the case does not cover the present, or rather, when rightly considered, it is a decision the

(1) 2 Ves. Sen. 100, 371.

M. R. 1875 BERESFORD v. BROWNING. BROWNING v. BERESFORD.

other way, because the ground of distinction being that the partners were properly liable to pay what they covenanted to pay, it shews that Sir *William Grant* thought that, had they previously been liable, the mere fact of giving further time or ascertaining the amount at once would not have altered the nature of the agreement.

The other case referred to is one much more difficult to deal with, the case of *Wilmer* v. *Currey* (1). In the first place it is to be noticed that there the partners were not mercantile partners. I cannot say whether that did or did not influence the Judge in the decision to which he came; but it is a noticeable fact that they were attorneys. The next thing is, there was not at that time any pre-existing obligation. It was an existing partnership. One partner retired and sold his share to the other two partners for a sum of money. They owed him nothing, there was no pre-existing debt, nor was there any existing liability. He sold them his share for a sum of £3222 16*s.* 6*d.* "to be paid and secured in such manner as is hereinafter expressed;" and the expression was a joint covenant. It was not, therefore, for money, but for money to be paid and secured in the manner therein expressed. In fact, he sold it for a joint covenant, and that was the contract; and it was held, as he sold it for a joint covenant, he got a joint covenant, and nothing more. The only point that appears to me to have been arguable in favour of the Plaintiff on those pleadings was that the joint covenant was a covenant by partners in a continuing partnership who were to take over the share of the assets, and in that way it would have been a contract by partners, that is, a partnership contract for value received by the partnership, and within, therefore, the general proposition laid down in *Sleech's Case* (2). I do not, however, find that point argued by counsel: nor is it discussed in the judgment. I cannot, therefore, hold this to be a decision that the second point was not a good one, because it is not noticed either in argument or judgment; and it appears to me that if this had been a mercantile partnership, the handing over the assets to a new firm in consideration of a covenant by the firm might have been held to

(1) 2 De G. & Sm. 347. (2) 1 Mer. 539.

create that kind of partnership contract for value received by the partnership which would have created a joint and several liability. All I can say is, that *Wilmer* v. *Currey* (1) does not decide the point. It may well be that the Vice-Chancellor, and the counsel also, thought the rule did not apply to a partnership between attorneys, and therefore did not argue the point; but certainly it is no decision.

The only other case referred to is a very curious case of *Clarke* v. *Bickers* (2), in which the Vice-Chancellor *Shadwell* held the covenant of two pawnbrokers contained in a lease to them was a joint covenant. He said that the lessors, although they lease to the pawnbrokers, although they describe them as partners, choose to take a joint covenant, not a joint and several covenant. He did not seem to consider it was a partnership contract. Whether that was so or was not, I do not know, but the decision was that it was not. The case is very short, and it does not at all militate against the view which I entertain. Therefore the general rule remains, that a partnership contract for value given to the partnership, being a mercantile partnership, is joint as well as several.

Now, how would that apply to the second part of this case. Supposing that the first set of considerations were out of the way on which I have already decided in favour of the applicant, and supposing it were a new agreement, as it has been argued before me, what does the agreement amount to? It is an agreement by three persons who are to continue to carry on a partnership business of a mercantile character that in consideration of a sum of capital or share of the assets handed over to them they will pay a sum of money. Even supposing those words made it joint at law, still, on the general principle as laid down by Sir *William Grant*, it would be joint and several in equity, it being a mercantile contract for value given by the firm to pay a sum of money. Were it a new contract instead of being a mere modification of the old contract, it appears to me it would come within the general line of cases that every mercantile contract for value given by the firm is in equity joint and several, although in form it may be joint at law. That accounts for the cases as to bonds and promissory notes and

(1) 2 De G. & Sm. 347. (2) 14 Sim. 639.

M. R. 1875

BERESFORD v. BROWNING.

BROWNING v. BERESFORD.

bills of exchange, in which, in equity, a creditor has been allowed to sue. So that even in that view I think the claimant ought to succeed.

But then it has been said that there are words of express contract in this agreement which destroy the liability which previously existed, and which would prevent the liability arising as regards several liability if it were a new contract. Now he who asserts that the legal liability has been released or destroyed must shew it plainly. As regards the old liability, it appears to me that the whole tenor of this instrument is against this construction, that the object is not to destroy it but to secure it, at the same time to give time to the persons liable to pay. The recital is that it will be impracticable or highly detrimental to the others to repay or advance from the business immediately after the retirement. Then the agreement is that they would not be compellable to repay immediately, but the clear balance was to be paid at certain intervals. The "immediately" contrasts with the intervals and the time for payment of the instalments, and, so far, therefore from intending to release the liability, as I said before, it appears to me the whole tenor of the instrument is simply to defer it as regards the time of payment, and to regulate it as regards the mode of ascertainment. I think, therefore, there are no words at all to help the Respondents. But it is said that the words are "to be paid by the continuing or surviving partners out of their business," and that that means that he is to look to the business carried on from time to time by the partners. But the word "business" there is evidently the capital. It is that "in such a case they shall not be compellable to pay his or their share in the partnership business immediately." Now "his share in the partnership business," the man being dead, must be the share to which he is entitled of the assets of the business, because being dead he has no share in the continuing business which is carried on by another partnership. Then it proceeds: "but the clear balance shall be repaid out of the business." Surely it would be a strange construction to read this as meaning that the interest of the deceased partner in the business (that is, his share of the partnership assets) is to be paid out of the business from time to

time to be carried on by any number of successive partnerships, and to leave him, or rather his estate, looking, not to the partnership assets, to a share of which he was entitled when he died, but to the chance of the thing being carried on for thirty years by successive partners of whom he knew nothing, This would be a very strange construction, and it appears to me it is not the natural or the proper construction. The words do not, as I think, mean that the payment is to be restricted to the business from time to time carried on by the partners for the time being, quite irrespective of how many die, or of what sums are drawn out of the capital; but as I said before, those who say that liability is released are bound to shew it by clear evidence, especially when the consideration, as far as I can see, is all the other way. The consideration is the giving of time to the partners for their convenience, not giving anything to the person whose executors are supposed to release the liability. Of course there is an observation to be made in answer to that, which I had not forgotten, that it is mutual, and therefore every one might expect to get a chance of the same benefit. But that does not make the construction contended for more probable, and I think that it is not the true construction of the instrument.

As, therefore, there is no term in this agreement which overrules the antecedent liability, or says that the new liability, if it were a new liability, is to be restricted in the way I have mentioned, I hold it to be a several obligation on the surviving partners.

Solicitors: Mr. *R. Smith;* Messrs. *Walker & Battiscombe;* Mr. *G. H. K. Fisher;* Mr. *William Sturt.*

M. R. 1875 July 10.

## *In re* WESTERN OF CANADA OIL, LANDS, AND WORKS COMPANY.

### CARLING'S CASE.

*Company—Directors—Agreement with Promoter—Adoption by Company—Acceptance of Shares from Promoter.*

R 10 Ch 598 ChD. 83-4

Previously to the formation of a company an agreement was entered into between the promoter and a trustee on behalf of the company for the sale to the company of certain property, partly in consideration of cash and partly of fully paid-up shares. The promoter induced three gentlemen to become directors, promising to transfer to them fully paid-up shares as their qualification (which the articles fixed at five shares). These directors afterwards adopted the agreement on behalf of the company, and subsequently thirty shares (part of those forming the consideration for the purchase) were allotted to each of them upon the nomination of the promoter. The contract was registered prior to the allotment:—

*Held*, upon the company being wound up, that all these shares must be treated as unpaid, and that the directors must be placed on the list of contributories for thirty shares each accordingly.

Reversed on appeal 2 Ch D 115

THIS was an application on behalf of the official liquidator of the *Western of Canada Oil, Lands, and Works Company, Limited*, that the Hon. *John Carling*, *Aquila Walsh*, and *Jacob Hespeler*, who had been directors of the company in *Canada*, might be settled on the list of contributories in respect of thirty shares each.

The circumstances under which these shares were allotted to Mr. *Carling* were stated in an affidavit by him, the material portions of which were to the following effect:—

The company was registered in *England* on the 23rd of December, 1871, with a capital of £450,000, divided into 4500 shares of £100 each.

The company was promoted by Mr. *John Walker*, of *London, Ontario, Canada;* and one-half of the share capital (being the only portion of the capital proposed to be issued on the formation of the company) was to be issued to the vendors of certain property which the company was formed to acquire. The rest of the capital necessary for carrying on the company's business was to be raised by debentures.

The memorandum of association was subscribed by *Walker* and

six other persons. By the articles of association it was provided that the first directors should be appointed by the subscribers to the articles, and should continue in office until the ordinary meeting of the company in 1874, and that the qualification of a director should be the holding of not less than five shares in his own right.

Towards the middle of January, 1872, *Walker* came to *Canada* and saw Mr. *Carling* on the subject of the company. He produced an agreement, dated the 18th of December, 1871, and expressed to be made between the said *John Walker* on behalf of himself and other vendors of the one part, and *William Hartley* as trustee on behalf of the *Western of Canada Oil, Lands, and Works Company*, of the other part, whereby *Walker* agreed to sell certain oil wells to the company at a price consisting of £175,000 in cash, and of 2250 fully paid-up shares. This agreement was registered. *Walker* asked *Carling* to become a director, stating that he (*Walker*) would transfer to him (*Carling*) certain fully paid-up shares in the company if he would consent to act as such director, such shares being for the purpose of qualifying *Carling* as a director of the company. *Carling* stated to *Walker* that he would be willing to act as a director in *Canada* of the company, upon *Walker's* informing him that a sufficient number of fully paid-up shares in the company to qualify him as a director would be transferred to him.

Messrs. *Carling*, *Hespeler*, and *Walsh* were accordingly appointed Canadian directors. Three English directors were appointed; and each set of directors was capable of constituting a board for the transaction of business.

On the 23rd of January, 1872, at a meeting of the Canadian directors (at which Mr. *Carling* was present), the agreement of the 18th of December, 1871, was adopted, and the solicitors were directed to investigate the title. At a subsequent meeting the same directors accepted the title to the property, and conveyances of the property were executed.

On the 9th of July, 1872, the English directors proceeded to allot the fully paid-up shares which formed part of the consideration for the property; and, in pursuance of directions given by *Walker*, thirty of such shares were allotted to Mr. *Carling*, and the certificates were afterwards forwarded to him, and it was only then

M. R. 1875 CARLING'S CASE.

that he became aware that any shares had been or would be allotted to him over and above the number required to qualify him as director. He never applied to the company for any shares.

The shares were allotted to Messrs. *Walsh* and *Hespeler* under similar circumstances.

The contract of the 18th of December, 1871, was filed with the Registrar of Joint Stock Companies previously to the 9th of July, 1872.

In November, 1873, the company was ordered to be wound up.

Mr. *Roxburgh*, Q.C., and Mr. *Whitehorne*, for the official liquidator, referred to *General Exchange Bank* v. *Horner* (1); *In re London and Provincial Starch Company* (2); *Madrid Bank* v. *Pelly* (3); *Hunt's Case* (4).

Mr. *Chitty*, Q.C., and Mr. *Dumergue*, for Messrs. *Carling*, *Walsh*, and *Hespeler*:—

These shares have been allotted as fully paid up, in pursuance of a contract which was duly registered prior to the allotment of the shares, and which has never been set aside. It is impossible, therefore, to treat these shares as being unpaid. *Walker* could hold them as fully paid; why cannot his nominees do so?

[The MASTER OF THE ROLLS referred to *Tyrrell* v. *Bank of London* (5).]

That case only decides that an agent must account to his principal for any profit he has derived by virtue of his agency; but these gentlemen have derived no profit: all that has accrued to them is a loss. Besides, they took no part in allotting the shares; that was done by the directors in *England*. Again, the only agreement with *Walker* was that he should provide them with a qualification; if there was anything wrong in such an agreement, it only extends to the five shares necessary to be provided by way of qualification.

[They referred to *Hartley's Case* (6); *Leifchild's Case* (7).]

(1) Law Rep. 9 Eq. 480.
(2) 20 L. T. (N.S.) 390.
(3) Law Rep. 7 Eq. 442.
(4) 37 L. J. (Ch.) 278.
(5) 10 H. L. C. 26.
(6) Law Rep. 10 Ch. 157.
(7) Law Rep. 1 Eq. 231.

SIR G. JESSEL, M.R.:—

I am of opinion that these gentlemen must be put on the list for the whole thirty shares as not being paid up.

The bargain is one which meets with the strongest disapprobation of the Court. These three gentlemen in *Canada*, two of whom apparently hold public positions, are the only three directors in *Canada* advertised to the public. The prospectus states the capital of the company is £450,000, and that the sum to be paid for the purchase of the lands, oil wells, works, general plant, &c., is £175,000 in cash, and £225,000 in ordinary shares, leaving £50,000 in hand to provide ample working capital. That prospectus was issued with the knowledge of these gentlemen, as appears by their own affidavit.

Now, the company was got up by a man named *John Walker*, who either had these lands, or had power to sell them at this enormous price. The way he got up the company was this. He went about to find people to be directors of the company, and he found these three gentlemen in *Canada*, and this is the story:—[His Honour then read extracts from Mr. *Carling's* affidavit to the effect stated above.] Now it is to be observed that the agreement of the 18th of December, 1871, purports to be made with one *Hartley*, who is of course described as a trustee on behalf of the intended company. This is an agreement prior to the existence of the company, and is in itself little better than waste paper, if not worse, and therefore would not, in my opinion, be such a contract as could be registered under the 25th section of the Act of 1867.

After these gentlemen became directors, they met and adopted this agreement on the part of the company, and directed the solicitor to investigate the title and complete the purchase under their authority; and it appears that, with the sanction also of the *London* directors, conveyances were made and the agreement carried out, with what disastrous results to the company is pretty notorious. After that the company is wound up, and then these gentlemen are put on the list, having been duly registered as holders of thirty shares each. They contend that they have paid £100 on each of the shares. They are asked for proof of this, and the only proof they can give is the contract of the 18th of December, 1871. They say, "We contracted with *Walker* to take part of the fully

M. R. 1875 CARLING'S CASE.

paid-up shares which he was to have; he nominated us to the board (of which we were members); the allotment was made on that nomination; and therefore the shares were issued with £100 paid." The answer is very plain. "The company was to pay Mr. *Walker*, the real vendor: you were agents and trustees for the company; you cannot, as against the company, take part of the purchase-money; you cannot claim the benefit of that part of the purchase-money, the amount of which you yourselves stipulated for and agreed to on behalf of the company. The company has a right to say that the purchase-money as between *Walker* and itself is to be treated as diminished by the sum which you as their agents agree to keep for yourselves, and therefore to say that there has been no valid payment of these sums of £100 each on these shares, and that the contract which you set up, under which you allege there was a valid payment, is wholly void as against the company." Whether you look at the 165th section, under which it could be recovered back as money paid, or whether you look at the contributory clauses, under which it can be treated as never having been paid at all (which is the more advantageous way of looking at it for the directors), in either way they would be liable to contribute this sum, and therefore I put them on the list for thirty shares each.

Solicitors: Messrs. *Lewis, Munns, & Longden;* Messrs. *Harrison, Beal, & Harrison.*

## *In re* MARIA ANNA AND STEINBANK COAL AND COKE COMPANY.

V.-C. M.
1874
Nov. 21.
1875
May 27.

MAXWELL'S CASE.
HILL'S CASE.

*Limited Company—Memorandum of Association—Liability to pay Debts—Contract by Articles of Association—Rights of Shareholders inter se—Fully paid-up Shares—Shares registered in two Names—Survivorship of Liability.*

By the memorandum of association of a company formed under the *Joint Stock Companies Act*, 1856, the liability was limited to £10 per share. By the articles of association it was provided, as regarded certain debts for which certain shareholders had given promissory notes, that if the company should be called upon to pay them, and should not have funds in hand applicable to the payment, each shareholder should contribute and pay to the company, as a debt due to the company, a proportionate amount according to the number of shares held by him:—

*Held*, that though the memorandum of association limited the extent of liability as regarded creditors outside the company, there was nothing in the Act of 1856 preventing the shareholders *inter se* from contracting to make themselves liable to a greater amount; that the provision in the articles of association constituted such a contract; and consequently that holders of fully paid-up shares might be put on the list of contributories for the purpose of having a call made to meet the liability so incurred.

Shares having been registered in the joint names of two persons, one of whom was since dead, the articles of association being silent as to the liability thereby incurred:—

*Held*, that by the *Joint Stock Companies Act*, 1856, a joint liability only was contracted, and that it survived on the death of the joint owner. The survivor was therefore alone liable to be placed on the list of contributories.

THE *Maria Anna and Steinbank Coal and Coke Company, Limited*, was formed on the 8th of September, 1857, under the *Joint Stock Companies Act*, 1856 (19 & 20 Vict. c. 47), for the purpose of working certain coal mines in *Westphalia*.

The nominal capital of the company was by the memorandum of association fixed at £160,000, divided into 16,000 shares of £10 each.

The 3rd, 4th, and 5th of the articles of association were as follows:—

"Adoption of two Debts of £20,000 and £10,000 contracted on behalf of the Company.

"3. *William John Marrow, John Owens Johnson, Joseph Hub-*

V.-C. M. 1874

MAXWELL'S CASE.

HILL'S CASE.

*back, James Henshall Hayes, Thomas Gorton,* and *Henry Jump,* six of the parties hereto, and *William Davies* of *Liverpool,* merchant, for the purpose of paying part of the purchase-money for the said mines, collieries, lands, and other property hereinbefore mentioned, and for the plant and working materials belonging thereto, borrowed on the security of their joint and several promissory notes from the *National Bank of Scotland,* the sum of £20,000, and from *R. L. Jump* the sum of £10,000, to be repaid in two years, with interest for the same after the rate of £8 per cent. per annum, as in such notes mentioned. The company shall pay the said sums of £20,000 and £10,000 and interest respectively, and if required by the said lenders, or either of them, shall give the promissory note of the company for payment of the respective principal lent with interest to the party requiring the same at the respective times mentioned in the respective promissory notes already given as aforesaid.

"Parties who have signed notes for the two debts, if called on for payment, to have power to sell the mines.

"4. If the said *William John Marrow, John Owens Johnson, Joseph Hubback, James Henshall Hayes., Thomas Gorton,* and *Henry Jump,* or any of them, shall be personally called upon for payment of the said sums of £20,000 and £10,000, or either of them, or any part thereof respectively, or for the interest for the same, the said *William John Marrow, John Owens Johnson, Joseph Hubback, James Henshall Hayes, Thomas Gorton,* and *Henry Jump,* or such of them as shall be so called upon, shall have power to raise the sum or sums of money which they shall be so required to pay, with all incidental expenses, either by mortgaging the mines, collieries, and property, or any part or parts thereof, or first by mortgaging and afterwards by selling the same, with full powers to the persons so mortgaging or selling to give receipts to the mortgagee or mortgagees, purchaser or purchasers, for the money advanced and paid, which shall effectually exonerate the person or persons paying or advancing the same from all responsibility as to the application thereof, and from all obligation to inquire as to the necessity or expediency of any such mortgage or sales, and the person or persons in whom the said mines, collieries, and property shall be vested in trust for the company, shall do and execute at the expense of the company all such acts, deeds, and things whatso-

ever as may be required for conveying and assigning the said mine, collieries, and property to the mortgagee or mortgagees, or purchaser or purchasers thereof.

"And the shareholders to contribute proportionably to the two debts if required to be paid when there are not funds of the company in hand applicable thereto.

"5. If the parties who have signed the above-mentioned notes for the said sums of £20,000 and £10,000, or any of them, or the said company, shall be called upon to pay the same principal sums, or either of them, or any interest for the same respectively, and the said company shall not have in hand funds of the said company applicable to the payment thereof of sufficient amount, then and in any such case each and every shareholder in the company for the time being shall contribute and pay to the company, as a debt due to the company, a proportionate amount of the sum or sums which the company shall be so called upon to pay according to the number of the shares held by each shareholder."

Article 39 was as follows:—

"Power of Directors.

"39. The business of the company shall be managed by the directors, who may from time to time appoint and remove all such agents, managers, *gérants*, or representatives, both in *England* and at the locality of coal mines and collieries and elsewhere, as they may from time to time think proper, and may also, for the purposes of the company, borrow and take up at interest, at such rate as they can agree upon with the lender or lenders, any further sum or sums of money, not exceeding in the whole the sum of £10,000, on the security of a mortgage or mortgages of all or any part of the real and personal property of the company, or on such other security as can be given by the company and the directors think proper, and may also exercise such powers of the company as are not by the above-mentioned statute or by these articles declared to be exerciseable by the company in general meeting, subject nevertheless to the regulations prescribed by these articles, and to such resolutions not being inconsistent with these articles as may be passed by the company in general meeting; but no resolution of the company in general meeting shall invalidate any prior act

V.-C. M. 1874

MAXWELL'S CASE.

HILL'S CASE.

of the directors which would have been valid if such resolution had not been passed.

Articles 76 and 88 were as follows:—

"76. Any capital raised by the creation of new shares shall be considered as part of the original capital, and shall be subject to the same provisions in all respects as if it had been part of the original capital; and if any further sum or sums shall be borrowed under clause 39 hereinbefore contained, each and every shareholder shall be liable to contribute rateably, according to the number and amount of his shares in the company, toward the repayment of so much of the sum or sums so borrowed and the assets of the company shall be insufficient to pay; and the repayment of any money borrowed in pursuance of these presents and of the interest thereon may be secured by mortgage debentures, promissory notes, or in such other manner as the directors may think expedient."

"Transmission of Shares.

"88. The executors or administrators of a deceased shareholder shall be the only parties recognised by the company as having any title to his share."

The company was unsuccessful, and was ultimately ordered to be wound up under the *Companies Act*, 1862. All the capital authorized by the memorandum of association was called up, but there still remained a liability in respect of the debts mentioned in the 3rd clause of the articles of association which the funds of the company applicable to the payment were insufficient to meet.

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1874. Nov. 21. MAXWELL'S CASE.

MR. *MAXWELL* was one of the original shareholders, and his shares had been paid up in full. He had since died, and the present summons was taken out by the official liquidator for the purpose of putting his executors on the list of contributories in order to contribute towards payment of the portion of the £30,000 not otherwise provided for.

The case was taken as representative of that of all the fully paid-up shareholders.

Mr. *Cotton*, Q.C., and Mr. *North*, for the official liquidator:—

The effect of the provisions as to limit of liability is substantially the same under the Act of 1856 as under the Act of 1862. Though the effect of the memorandum of association is to limit the amount of the capital to £10 per share, it is clear that under clause 5 of the articles of association there is a liability under some circumstances, in addition to the £10 per share, to pay, as a debt due to the company, a proportionate amount of any sums which the company might be called upon to pay; and by clause 76 of the articles this liability is expressly recognised and treated as a liability to which the shareholders may be called upon to contribute in the same way as in respect of calls upon their shares. There was a contract that if, under any circumstances, the company had not enough to pay the parties mentioned in the 3rd clause of the articles, the shareholders would, as between themselves, contribute to the deficiency according to the number of shares held by them. The limit of liability, according to the contract between the shareholders, is £10 plus so much as has been incurred under the 5th clause of the articles. *In re Marlborough Club Company* (1) will very likely be cited on behalf of the contributories, but it is clearly distinguishable from the present case. That was an application to make a supplemental list of contributories of fully paid-up shareholders as a means of recovering from them debts not due under the articles of association, or which could be paid by a call made rateably in proportion to the shares. The application was very properly refused.

There is in any case a liability which might be enforced by bill, and the object of the Winding-up Acts, which was to prevent the great amount of litigation which would arise if each member of an association must be proceeded against by a suit in equity, would be frustrated if it were held that parties, who by the articles of association contracted for a particular liability, could not have it enforced against them by proceedings under the winding-up.

Mr. *J. Pearson*, Q.C., and Mr. *W. F. Robinson*, for Mr. *Maxwell's* executors:—

The members of this company had no authority by anything

(1) Law Rep. 5 Eq. 365.

V.-C. M. 1874

MAXWELL'S CASE.

contained in the articles of association to contract a liability not authorized by the memorandum of association. The fluctuating liability supposed to attach to the shares cannot be ascertained till the accounts are taken and it appears what balance of the £30,000 debts remains unpaid.

The only question is whether there is any liability to be put on the list of contributories in respect of these shares. That depends upon the nature of the shares, which must be determined from the memorandum of association. The description of the shares is fixed by the memorandum, and no provisions of the articles of association can transform shares on which there is only a liability to the extent of £10 each into others on which there is an additional liability. The unpaid balance of the £30,000 may be a debt on which individual shareholders are liable to be sued, but in a suit or action the liability is quite different from one under the winding-up of a company. A set-off may be pleaded to an action or suit, but this cannot be done in the case of a liability to contribute by way of calls. The only question now is as to the liability of a fully paid-up shareholder to be placed on the list of contributories, and *In re Marlborough Club Company* (1) is a distinct authority that this cannot be done. As in that case, the parties here are sought to be put on the list of contributories for the purpose of recovering debts due to the company.

A further contribution could only be recovered either as additional capital or as a debt. If this is an attempt to raise further capital, the answer is that the capital has been fixed by the memorandum of association, and can only be increased in the mode prescribed by clause 76 of the articles of association. If the company seeks for contribution in respect of a debt due from the individual shareholders to the company, the claim is one which, if capable of being enforced at all, can only be enforced in the ordinary way, by action or suit. Payments upon the shares are enforced by calls, but debts do not require those formalities.

The 7th section of the *Companies Act*, 1862, which in substance corresponds with the 41st section of the Act of 1856, provides that the liability is to be limited to the amount prescribed by the memorandum of association; that is to say, it is only by referring

(1) Law Rep. 5 Eq. 365.

to the memorandum of association that a shareholder can be called upon to contribute in the case of a winding-up.

This is an attempt to constitute one liability by the memorandum of association and another by the articles, which, whether it could or not be done under the Act of 1862, could not be done under the Act of 1856: *Leifchild's Case* (1).

Mr. *Cotton*, in reply:—

This is not a claim by a creditor in the winding-up, but one in which certain of the shareholders call for contribution from the others, which they have by the articles of association contracted *inter se* to pay. It may be that, as regards creditors outside the company, the liability would be limited to the amount prescribed by the memorandum of association; but there is nothing in the Act of 1856 prohibiting shareholders from agreeing amongst themselves to contribute to a larger amount than the nominal capital.

SIR R. MALINS, V.C.:—

This case is one of very considerable difficulty, and is involved in confusion by the contract into which the parties have entered. The company is a company formed in 1857 under the Act of 1856. There were then, as there are now, in companies a memorandum of association and articles of association. The memorandum of association prescribed that the nominal capital of this company should be £160,000, divided into 16,000 shares of £10 each. It was therefore unquestionably a company with limited liability. The memorandum of association is a sort of proclamation to the public of the nature of the company. Then there are the articles of association of the same date which constitute the arrangement of the shareholders among themselves, and by the Act of 1856 that makes a contract between them just as if every member had put his hand and seal to the memorandum of association. Now the articles of association by the 3rd clause recite that certain of the members of the company, six in number, had borrowed money for the purposes of the company; £20,000, from the *National Bank of Scotland*, and £10,000 from Mr. *Jump*, making altogether £30,000. If

(1) Law Rep. 1 Eq. 231.

V.-C. M. 1874 MAXWELL'S CASE.

this was to be paid out of the subscribed capital, no doubt it ought to be paid out of the £160,000 capital, if that was enough; but if it was to be limited to that under all circumstances, it would have been unnecessary to have these special provisions. But the 3rd clause of the articles reciting the existence of that debt, the 5th clause of the articles goes on to provide as follows:—[His Honour then read the 5th article, and continued:—] That is, Mr. *Maxwell* says to these six persons, and to every other shareholder in the company, that if that debt is called for he will contribute to the payment according to the number of shares held by him. Now, the first question which arises is, whether this is a liability only to the extent of £10, or is a liability over and above £10. If it were to be a liability limited to the £10, it would have been unnecessary to insert these special clauses, because the proper course would have been to make calls to meet the demand when made, and the only circumstance would be that the call would involve a delay of twenty-one days. Upon those two clauses alone I should come to the conclusion that it was a contract between the shareholders *inter se* that over and above the £10 to which they were liable by the memorandum of association, that is, as between themselves and outsiders, they will *inter se* be liable, to whatever the amount may be, to pay so much of this debt as the assets of the company cannot pay. That there was something more intended by these articles than the ordinary provisions, I think is also plain from the clauses 76 and 39, which Mr. *Cotton* referred to in his opening; he did not particularly read out clause 39, but clause 76 refers back to clause 39; and in order to see what is the meaning of clause 76, I refer to clause 39 [His Honour then read clauses 39 and 76, and continued:—] These clauses shew, to my mind, most distinctly that they contemplated amongst themselves that there was to be a liability in respect of these shares over and above £10; because if it were only to be limited to the £10, then out of the £10 it must be paid or not at all; but here the contract is, that if they borrow the money every member shall contribute rateably, according to the number and amount of his shares in the company, toward the repayment of so much of the sum or sums so borrowed as the assets of the company shall be insufficient to pay, and that the repayment of any

money borrowed, and of the interest thereon, may be secured by mortgage debentures or promissory notes. Therefore, not only by the 5th section, but by the 76th section in connection with the 39th section, I think it is most clearly shewn that the intention of the parties to these articles of association was to create a liability *inter se* to pay a sum of money over and above the £10 which they would be liable to pay to outsiders or creditors.

Is there anything illegal or improper in this? Suppose the case of a company formed with £10 shares, which is the extent of their liability to creditors and third persons, and by the articles of association agreeing that upon a certain event happening, such as the acquisition of additional property, every member would contribute £2 a share more,—there would be nothing in that improper, or which this Court would be unwilling to enforce. If the additional property is acquired, every one considers that he is bound to pay £2 more. There is no illegality or impropriety in that. It is perfectly clear, upon general principles, to my mind in this case that the shareholders have, under a perfectly legal contract, contracted with each other, that in the events which have happened, of the assets of the company being insufficient to pay the £30,000 debt, every member of the company will contribute what is necessary over and above £10 to pay it. Therefore it is, in my opinion, a liability that can be enforced. That being the case, the point which was most strenuously argued was that it is a liability which cannot be enforced in the course of the winding-up. That depends on the construction of the Act of Parliament. I quite agree with Mr. *Pearson's* and Mr. *Robinson's* argument, that no call could be made for the sake of the creditors beyond the £10, and that, in my opinion, is the meaning of the 15th section of the Act of 1856, and the 7th section of the Act of 1862. I think that Mr. *Cotton* has met the argument in his reply. It pressed my mind very much before, but what he said has enabled me to come to a satisfactory conclusion upon the subject. In the 15th section there are two classes of things to be considered, the liability of the shareholders to the outer world, how far they can be called upon to pay debts, and so forth, and what they can be called on to pay *inter se*, because this winding-up process is a substitution for the old suit of contribution, and the object is not only to pay the debts, but to settle finally and adjust the rights

V.-C. M. 1874 MAXWELL'S CASE.

*inter se.* [His Honour then read the 15th section of the Act of 1856.] That fixes the amount of shares which can be issued. Now I do not think that there is any clause of the Act of 1856 which has any particular application to it beyond that. I do not see that the 6th section has any particular application to the question now to be decided. But it bears out what I say, that for the purpose of winding up, that is, paying the debts and winding up, the shareholder is not to be liable beyond the amount unpaid on the shares held by him. I think, also, that there is nothing in the 7th section of that Act affecting this question. Therefore I quite assent to the argument of *Maxwell's* executors so far, that under the winding-up no call could be made for the purpose of paying the creditors beyond the £10. The 7th section of the *Companies Act*, 1862, under which this winding-up order was made, and which Mr. *Robinson* has so much relied on, quite bears out this view. It is certainly very strange that when there are two documents, the memorandum of association and the article of association, which define the liabilities, we thus should be confined to the memorandum of association; but so it is, and I must take the words of the Act of Parliament as I find them. Therefore I come to the conclusion that as regards creditors, and as regards the expenses of the winding-up, no call can be made beyond the amount prescribed in the memorandum of association.

This, then, being a winding-up under the Act of 1862, there now comes the very material enactment in sect. 38, which prescribes the liability of members. It is an enactment which, but for the qualification at the end, would result in producing an unlimited liability. Without that limitation it is perfectly clear that a call might have been made for the purpose of adjusting the liability of the contributories among themselves, which, as I have already pointed out, is a contract that each of them will pay such a sum of money over and above the calls on the shares as is sufficient to pay this debt. The 4th sub-section is relied on as limiting the liability to £10 per share; it does not have that effect, but limits it to the amount necessary to pay the debts and the costs of the winding-up, and to adjust the rights between themselves. But it does not say that no contribution shall be required from any member exceeding the amount mentioned in the memorandum of association, but it says, beyond "the amount, if any, unpaid on the shares in respect

of which he is liable as a present or past member"—that is, to such an amount as will pay the debts, the costs of the winding-up, and will adjust the rights of the contributories amongst themselves. What are the rights of the contributories here amongst themselves? The liability as between themselves is £10 plus such a sum as they have by contract agreed to pay. Each of them has contracted with the others that he will pay such a sum as will, over and above the £10, pay this debt. That is, in my opinion, just the same as if by the articles of association they had contracted that over and above the £10 they would among themselves each pay such a sum as would enable them to buy another property, or to pay for the property already purchased, or do anything else. Therefore I come to the conclusion, first, that there is a debt over and above the £10; secondly, that it is a debt which is due from one to the other, which can be enforced by a suit; and, thirdly, I think that it is within the scope of these Acts of Parliament. It is for the benefit of all parties, certainly, that if the liability exists, and in the case of Mr. *Maxwell's* executors it is greatly for their benefit, that by this simple process of calls this liability should be got rid of, instead of their being burdened with I do not know how many heavy Chancery suits. It is within the purview of the Acts of Parliament that this mode of adjusting rights *inter se* should be enforced by calls. Then I think, however, that there is no additional liability to pay the expenses of the winding-up. So far as the winding-up is limited to the £10, therefore, they are not liable to pay the expenses of the winding-up, but they are liable to pay the additional sum which will adjust the rights in the manner which I have pointed out. Therefore I must so qualify the liability that they are not to be liable to any further call to pay the expenses. I think that *In re Marlborough Club Company* (1) has no real bearing on the present case.

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1875. May 27. HILL'S CASE.

MR. *WILLIAM HARGREAVES* and Mr. *William Hill*, were the allottees and holders of 286 shares in the company, and their

(1) Law Rep. 5 Eq. 365.

V.-C. M. 1875 HILL'S CASE.

names remained on the list the last time the register of shareholders was made up, which was in 1866. The shares were simply registered in their joint names without notice of any trust.

*William Hill* died on the 9th of September, 1861, but no notice of his death was given to the company, and on the settlement of the list of contributories the official liquidator in the first instance included his name as well as that of Mr. *Hargreaves,* who was still living.

Mrs. *Margaret Hill,* the widow of *William Hill,* became his personal representative by taking out letters of administration on the 6th of February, 1863, and the official liquidator, on being informed of the death of *William Hill,* placed her on the list as such personal representative.

The name having been settled on the list by the Chief Clerk, a motion was now made to remove it.

Mr. *Glasse,* Q.C., and Mr. *Freeling,* for the motion:—

The two names being simply entered on the list without anything to indicate a severance, the parties were joint tenants; and on the death of Mr. *Hill* the legal and equitable interest in the shares, and therewith the liability, survived to Mr. *Hargreaves*: *Garrick* v. *Taylor* (1); Mr. Justice *Lindley* on the Law of Partnership (2). The legal title must have survived, and the personal representatives of Mr. *Hill* could not have transferred the shares.

It is not sought to establish a liability on the ground of past membership.

Mr. *Higgins,* Q.C., and Mr. *North,* for the official liquidator:—

The presumption is that Messrs. *Hill* and *Hargreaves* were trustees, and if so the company are entitled to have the trust fund fully represented. But whether that were so or not, when Mr. *Hill* became a shareholder, which he did when the deed was duly signed, he incurred this liability, from which he has not been discharged. The fact of the death ought not to take away from the company the security which was allowed by Mr. *Hill's* representatives to continue to be held out to the public. If they wished to bring his liability to the company to an end, they ought to have

(1) 4 D. F. & J. 159. (2) 3rd Ed. p. 686.

sent notice of his death to the company. Mr. Justice *Lindley*, in the passage cited, and *Garrick* v. *Taylor* (1), only refer to the beneficial interest in the shares. Moreover, *Garrick* v. *Taylor* was not a case of a winding-up, but merely a question as to the rights of co-owners between themselves.

Mr. *Glasse*, in reply.

SIR R. MALINS, V.C.:—

This case, so far as I know, is entirely novel, and it has not been suggested that the question has ever arisen before. The point was a novel one which I decided in *Maxwell's Case*, where the shares had been fully paid up to the amount of £10, and the liability as to the outer world had ceased, but there had yet remained the liability of the shareholders in order to settle their liability *inter se*. That decision has not been questioned, and therefore, I suppose, is correct. Now the case I have to dispose of is this: the company being established in 1857, somehow or other two gentlemen, by name *William Hill* and *William Hargreaves*, were settled on the list as the joint, not separate, holders of a certain number of shares. The consequence is, that as between themselves they are unquestionably joint tenants, so that if one of them dies the whole of the shares go to the survivor. *William Hill* died in 1861, and the consequence was that the legal interest in the shares vested in the survivor, *William Hargreaves*, who is still alive. The contention now is, that Mr. *Hill's* representative, as well as Mr. *Hargreaves*, must be put upon the list of contributories as liable in respect of these shares. It would be a grievously hard case if this could be done, and would require very strong reasons to justify it. The question is not now as to any arrangement between Mr. *Hill* and Mr. *Hargreaves* as to their rights *inter se*. It arises solely as between them and the company, because the claim is made by the official liquidator. The case is put thus: The Act of Parliament then in force, that is, the Act of 1856, says that every shareholder must be considered in the same situation as if he had covenanted in the terms of the articles of association. I am therefore bound by the Act of Parliament

(1) 4 D. F. & J. 159.

V.-C. M. 1875 HILL'S CASE.

to treat *William Hill* and *William Hargreaves* as having covenanted to abide by the articles of association and every clause therein contained.

Now if this is a joint and several covenant, Mr. *Hill* is liable. If, on the other hand, it is a joint covenant only, the liability ceased on his death, and Mr. *Hargreaves*, the survivor, is alone liable. I am of opinion that, inasmuch as the Act of Parliament does not provide for a plurality of shareholders, for it does not say that they must be considered jointly and severally, but simply that the shareholder must be considered as having covenanted in the terms of the articles of association, the proper construction is that they must be read as if they had run, "*William Hill* and *William Hargreaves* covenant as follows." Then would follow all the articles. Those words would make a joint covenant, and the consequence is that the liability of *Hill* ceased when he died. I think the Act of Parliament has fixed the liability of shareholders, and I must regard this as a joint covenant only. Consequently, the liability of *Hill* ceased in 1861. I confess I am very glad to find the view I take confirmed by the provision in the 88th of the articles of association, that executors and administrators of a deceased shareholder shall be the only parties recognised by the company as having any title to his share." According to this, therefore, the moment *Hill* died the company could only recognise *Hargreaves*. If there is a deceased shareholder, his executors or administrators are the only persons to take his shares. *Hargreaves*, as the survivor, would have still been a shareholder, and the company would be entitled to proceed against him. This is therefore, in my opinion, a joint covenant, and the liability of *Hill* ceased at his death. The name of Mrs. *Hill* must consequently be taken off the list, and her costs must be paid out of the estate.

Solicitors: Mr. *W. W. Wynne;* Messrs. *Crowder, Vizard, & Anstie;* Messrs. *Field, Roscoe, & Co.*

## THORNTON *v.* THORNTON.

V.-C. M.
1875
July 14.

[1875 T. 22.]

*Appointment—Special Powers—General Words—Reddendo singula singulis.*

A testator gave his estate by will to trustees in the following words:—"I give, devise, and bequeath all my property over which I have any disposing power." The trusts of the will were for his wife for life for her separate use, and after her death for all his children who should attain twenty-one in equal shares, and upon failure of children for the brothers and sisters of his wife:—

*Held*, that the will must be read *reddendo singula singulis*, and operated as an appointment under two special powers, one of which was a power to appoint among his children subject to a life interest in his wife during widowhood; and the other was a power to appoint a life interest to his wife in a fund which, subject to such power, was held on trust for his children at twenty-one in equal shares.

### Special Case.

By a family settlement of the 18th of October, 1870, and made between *Thomas Thornton* the elder of the first part, *Thomas Thornton* the younger of the second part, and certain trustees of the third part, it was declared that the trustees should hold a sum of £10,000 Reduced 3 per Cent. Annuities, which was recited to have been transferred into their names, upon trusts therein mentioned as to investment, and the settlement proceeded as follows:—"And shall pay the dividends, interest, and income of the said bank annuities, and of the moneys, stocks, funds, and securities into or for which the same or any part thereof may be converted or transposed by monthly instalments or payments unto the said *Thomas Thornton* the younger during his life for his own use, and so that he shall have no power to anticipate the growing payments thereof, and his receipt alone to be a good and sufficient discharge to the said trustees or trustee, or until the said *Thomas Thornton* the younger shall become bankrupt or take the benefit of the Act for the relief of insolvent debtors; and after his death, or in the events aforesaid, in case he shall leave a widow him surviving, upon trust to pay the said dividends, interest, and annual income unto such widow during her life, or until she shall marry again,

V.-C. M. 1875 THORNTON v. THORNTON.

for her sole and separate use, so that her receipts alone shall be good discharges for the same; and that she shall not have power to deprive herself of the benefit thereof by sale, mortgage, charge, or otherwise, in the way of anticipation; and from and after the decease or second marriage of such widow, or the bankruptcy or insolvency of the said *Thomas Thornton* the younger, the said trustees or trustee shall stand possessed of the said bank annuities or trust fund, and the dividends, interest, and annual income thereof, in trust for all or such one or more exclusively of the other or others of the issue of the said *Thomas Thornton* the younger to be born during his life or within due time after his death, at such age or time or respective ages or times, if more than one, in such shares and with such future and executory or other trusts for the benefit of the said issue, or some or one of them, and with such provisions for their respective maintenance, education, or advancement, at the discretion of the said trustees or trustee for the time being, and upon such conditions, with such restrictions, and in such manner as the said *Thomas Thornton* the younger shall by will or codicil appoint; and in default of such appointment, and so far as no such appointment shall extend, in trust for all the children or any the child of the said *Thomas Thornton* the younger who being sons or a son shall attain the age of twenty-one years, or being daughters or a daughter shall attain that age or marry under that age, if more than one in equal shares."

*Thomas Thornton* the elder, by his will, dated the 14th of July, 1865, made certain dispositions not necessary to be stated, and by a codicil to his will dated the 5th of October, 1868, he provided as follows:—"I hereby revoke the before-mentioned devises and bequests and all others contained in my said will (if any) in favour of my said sons *William West Thornton* and *Thomas Thornton*, and in lieu thereof I give and bequeath unto the trustees or trustee for the time being of my said will two several sums of £20,000 £3 per Cent. Consolidated Bank Annuities, upon trust from time to time to pay the interest, dividends, and annual income of one such sum of £20,000 to each of my said sons *William West Thornton* and *Thomas Thornton* during his life, or until he shall execute any charge, incumbrance, or alienation

thereof or any part thereof, or the same or any part thereof shall be or become assigned or charged, or assignable or chargeable, or but for this clause would be or become assignable or chargeable by operation of law, and after his decease, or any such charge, incumbrance, alienation, or assignment, upon trust for such of his children as shall attain the age of twenty-one years, and if more than one, in equal shares as tenants in common; and in case he shall have no child who shall live to attain a vested interest under the trusts aforesaid, upon trust for the person or persons who, under the Statutes of Distribution, would have been entitled to his personal estate if he had died a bachelor and intestate, and if more than one, in like shares. And I declare that, notwithstanding anything herein contained, it shall be lawful for each of my said sons who shall leave a widow surviving him, by his last will and testament, or any codicil, to bequeath or appoint the dividends or income of the said trust moneys hereinbefore bequeathed in trust for him, or any part thereof, to her or for her benefit for the whole or any part of her life."

*Thomas Thornton* the elder died on the 7th of November, 1870, and his executors set apart the £20,000 legacy bequeathed for the benefit of *Thomas Thornton* the younger.

*Thomas Thornton* the younger, in April, 1873, presented a petition for liquidation of his affairs in bankruptcy, and thereupon the trustees of the settlement and will ceased to pay him the income of the trust funds. He died on the 13th of November, 1874, having made his will, which was dated the 11th of October, 1871, and was as follows:—

"I, *Thomas Thornton*, of *Sutherlands, Warmington*, in the county of *Sussex*, gentleman, do declare this to be my last will and testament. I give, devise, and bequeath all my property over which I have any disposing power at my decease unto my wife *Helen Maria Thornton*, and *Samuel Thomas Frieggle* and *Henry Cheswick Frieggle*, both of *Croydon*, in the county of *Surrey*, gentlemen, their heirs, executors, and administrators, upon trust to hold my said property and pay the annual income thereof to my said wife for and during her life for her own sole and separate use independent of any future husband, and after her decease upon trust for all my children, or any my child who shall live to attain the

V.-C. M. 1875 THORNTON v. THORNTON.

age of twenty-one years, in equal shares, and if only one such child shall live to attain that age, then the whole to such my child, and on failure of such child living to attain the said age, then the said trustees or trustee for the time being of this my will shall hold the said property and the annual income thereof upon trust for the brothers and sisters of my said wife in equal shares and proportions."

The special case was filed by *Helen Maria Thornton*, the widow of *Thomas Thornton* the younger, against the children, and asked the opinion of the Court as to whether the will of *Thomas Thornton* the younger operated as an appointment of either or both the funds.

Mr. *Everitt*, for the Plaintiff:—

This case falls within the rule laid down in *In re Teape's Trusts* (1), where, although the words of the appointment conferred a larger estate than was warranted by the power, the power was held to be well exercised so far as the provisions of the appointment were consistent with it. That case only followed the previous decision in *Ferrier* v. *Jay* (2), where there was a direction for payment of debts, and a special power which did not allow of that provision was held to be exercised by applying the principle of *reddendo singula singulis*, and allowing the debts to be paid out of the portion of the testator's property liable to pay them.

Mr. *Glasse*, Q.C., and Mr. *Stock*, for the children:—

*In re Teape's Trusts* was a case of a simple excess in the extent of the interest purported to be granted by the appointment over that of the power. So in *Ferrier* v. *Jay*, by treating the words directing the payment of debts as applicable only to the part of the estate which could be so dealt with, the difficulty was obviated. So also in *Cowx* v. *Foster* (3). Here there is a two-fold difficulty, the appointment being consistent with neither power. The provisions of the will are not sufficiently applicable to either power to afford evidence of an intention to exercise it.

(1) Law Rep. 16 Eq. 442. (2) Law Rep. 10 Eq. 550.
(3) 1 J. & H. 30.

SIR R. MALINS, V.C., after stating the facts, continued :—

Under the settlement the Plaintiff takes a life interest during widowhood, independently of any appointment. Under the will of *Thomas Thornton* the elder she only takes an interest if her husband gives it to her. Similarly, under the settlement there is a power to appoint amongst children, while under the will there is no such power.

Now the questions are, whether the will of *Thomas Thornton* the younger operates as an appointment, first, under the will, and secondly, under the settlement. I must attribute to him knowledge of the settlement, and of his father's will. I must also attribute to him the intention of so arranging his property that it should go to his wife for life and then to the children. I must also assume that he had a competent knowledge of the law. Now he describes the property he intends to deal with as "all my property over which I have any disposing power." Those words are extensive enough to include property over which he had a special power of appointment, but as he has made a disposition not consistent with either of his powers, the question again arises which I had before me in *Ferrier* v. *Jay* (1), and which was also considered by Lord *Hatherley* when Vice-Chancellor in *Cowx* v. *Foster* (2), and by Lord *Selborne*, sitting for the Master of the Rolls, in *In re Teape's Trusts* (3).

The result of these cases is, that the will operates as an exercise of a special power if it embraces all the objects of the power. In *In re Teape's Trusts*, where a wife would take no interest except under an exercise of a special power of appointment, the power was held to be well exercised by general words, though the words of appointment were rather more extensive than was consistent with the power. In *Ferrier* v. *Jay* I had also decided that an appointment in general words would extend to a special power, where the appointment was in favour of the objects of the power, though there were provisions inapplicable to it.

The difficulty I had to contend with in *Ferrier* v. *Jay* arose by reason of the testator in the first instance charging his property with the payment of his debts; but applying the rule of *reddendo*

(1) Law Rep. 10 Eq. 550. (2) 1 J. & H. 30.
(3) Law Rep. 16 Eq. 442.

V.-C. M. 1875 THORNTON v. THORNTON.

*singula singulis*, I attributed the charge of debts to the property which could be so charged, leaving the appointed property to go according to the appointment. Mr. *Glasse* argued that the words in the will did not indicate an intention to exercise the special power. But when the testator speaks of all the property over which he has any disposing power, I think he does shew an intention to exercise a special power. It is true that there is also the gift over to collateral relations. But applying the same principle of *reddendo singula singulis*, that part of the will may be held applicable to property which he could so dispose of. Therefore, on the authority of all the three cases of *Cowx* v. *Foster* (1), *Ferrier* v. *Jay* (2), and *In re Teape's Trusts* (3), I am of opinion that there is nothing in the will to prevent it from being an exercise of the power in the former will.

With regard to the settlement there is more difficulty, because a life interest is given to the widow till re-marriage, and the husband has no power to appoint anything to her. What he has is a power to distribute the fund amongst the children, and he in fact leaves the fund to go equally amongst those who attain twenty-one.

But he says that he gives all his property over which he has any disposing power. If he had simply directed that it should go to the children at twenty-one, I think it would have been clear that he intended to execute the power; and on the whole I am of opinion that, acting on the rule on which *Ferrier* v. *Jay* was decided, I may distribute the provisions of the will amongst the funds to which they are applicable. Applying the principle I have mentioned to this case, I hold that he has exercised the power under his father's will to appoint a life interest in the fund bequeathed by it to his widow, and has also exercised the power given by the settlement to appoint amongst his children.

On these grounds, therefore, I hold that both the powers are well exercised.

Solicitors: Messrs. *Jones, Arkcoll, & Jones.*

(1) 1 J. & H. 30. (2) Law Rep. 10 Eq. 550.
(3) Law Rep. 16 Eq. 442.

## *Ex parte* GOVERNORS OF CHRIST'S HOSPITAL.

V.-C. M.
1875
July 16.

*Lands Clauses Act, s.* 80—*Reinvestment in Land—Restricted Contract—Purchaser's Costs.*

When money paid into Court under the *Lands Clauses Act* is sought to be reinvested in land upon a contract which throws upon the purchaser costs of the purchase which in an open contract would be borne by the vendor, the costs directed to be paid by the company will be limited to those which in an open contract would be purchaser's costs.

THIS was a Petition for reinvestment in real estate of certain funds paid into Court under the *Lands Clauses Consolidation Act.*

The funds in Court comprised the purchase and compensation money of real estate belonging to the Governors of *Christ's Hospital*, part of which had been taken on behalf of the Postmaster-General, part by the *London and North Western Railway Company*, and the remainder by the *Metropolitan District Railway Company.*

The Governors of *Christ's Hospital* had, on the 23rd of June, entered into a conditional contract with *Julius Calisher* for the purchase of a freehold house, No. 9, *St. Mary Axe*, in the City of *London*, and one of the terms of the contract was that the costs of furnishing abstracts, and certain other expenses which in an open contract would be thrown upon the vendor, should be borne by the purchaser.

The Petition asked for the approval of the Court to the investment, and for the application towards providing the purchase-money, of the entirety of the funds paid in by the Postmaster-General and the *Metropolitan District Railway Company*, and so much of the fund paid in by the *London and North Western Railway Company* as should be required to make up the balance; and that the costs should be paid, as to the *ad valorem* stamp, rateably between the three bodies, and as to the residue of the costs, by them equally.

Mr. *Freeling*, for the Petitioners.

Mr. *C. T. Simpson*, for the Postmaster-General, asked that the costs to be paid by the Respondents should be limited to such costs

V.-C. M. 1875 *Ex parte* Governors of Christ's Hospital.

as would in an open contract be purchaser's costs. He referred to *In re Stephen's Estate*, which came before Vice-Chancellor *Bacon* on the 27th of June, 1875, in which a similar order had been made.

Mr. *Speed*, for the *London and North Western Railway Company*, and

Mr. *F. C. Norton*, for the *Metropolitan District Railway Company*, supported the same view.

Sir R. Malins, V.C., ordered accordingly.

Solicitors: Messrs. *Beachcroft & Thompson*; Mr. *Roberts*; Messrs. *Norton, Rose, & Co.*

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V.-C. M. 1875 *July* 21.

## ETHERINGTON *v.* WILSON.

[1875 E. 36.]

*Charity—Christ's Hospital—Election of Children—"Parishioner"—Unqualified Candidate—Re-election.*

Under a scheme sanctioned by the Court for a charity entitling a parish to elect children for *Christ's Hospital* it was provided that no child should be eligible unless born in the parish, or unless his or her parents, or one of them, should be, or should have been, parishioners or a parishioner of the parish:—

*Held*, that the word "parishioner" must be construed in an honest and *bonâ fide* manner, and could not be applied to a person taking a small house temporarily for the mere purpose of obtaining a qualification:

*Held*, also, that where an unqualified candidate was elected after notice to the electors of such disqualification the votes were thrown away, and the opposing candidate, though having only a minority of votes, was duly elected.

Motion for decree.

This was a bill filed by *Edward D. Etherington*, an infant, by *James W. Etherington*, his father and next friend, against *Henry A. Wilson* and the vicar and churchwardens of the parish of *Twickenham*, *Middlesex*, and the Mayor and Commonalty and Citizens of *London*, as Governors of *Christ's Hospital*.

The bill stated that by deeds dated the 18th and 19th of November, 1720, *John West* and *Frances* his wife conveyed certain lands and tenements in *London* and elsewhere to the governors of *Christ's Hospital*, upon trust to receive and admit into *Christ's Hospital* and maintain and educate such and so many poor boys and girls, whereof more than three-fourths were always to be boys, as should from time to time be elected by five different parishes therein named, one-fifth of whom were to be such as the minister, churchwardens, and parishioners of *Twickenham*, or the major part of them, should (being in vestry assembled) for that purpose choose and present, or cause to be presented, according to the directions thereinafter contained; and it was afterwards provided that such poor boys and girls should be born in the respective parishes so entitled to present; and if there should be no such poor boys or girls found in the parish whose right it was to present when such election and presentation ought to be made, then the minister, churchwardens, and parishioners should upon every such occasion elect and present other poor boys or girls born in any other contiguous parish or place. It was also provided, that in all such elections respect and regard should be had to those children related, or credibly reputed to be related, by consanguinity, to the said *John West* and *Frances* his wife, or either of them, and that such relations should (if poor) be preferred to all others; and it was further provided that the right of election and presentation conferred upon the five different parishes should be forfeited in case of no election being made within three months after any vacancy should have occurred.

An Act of Parliament was passed in the 46th year of Geo. 3, c. xxii. enabling the Court of Chancery to make regulations for management of this charity; and a petition was presented by the parish of *Twickenham* in the year 1862 to the governors of *Christ's Hospital*, that they would apply to the Court for a scheme, and in pursuance thereof an application was made to the Court, and a scheme was directed to be prepared by an order dated the 24th of July, 1863.

On the 11th of December, 1868, a scheme was adopted and carried into effect by the Court, which provided, amongst other things, that the claims of children to be admitted to *Christ's*

V.-C. M. 1875 ETHERINGTON v. WILSON.

*Hospital* should be determined by the minister, churchwardens, and parishioners of the parish whose turn and right it was to elect and present in vestry assembled, pursuant to notice; that in the event of two or more children claiming on the same occasion to be admitted, the election should be determined by the majority of votes of the vestry taken according to the Acts or Act for regulation of vestries for the time being in force in that particular parish; that notice in writing of each vacancy, and of the times and places appointed for holding the vestry meeting for the election of a child to supply such vacancy, should be affixed to the door of the church not less than ten days prior to the day on which the meeting was to be held; and that no child should be considered eligible to partake of the benefits of this charity unless he or she should have been born in, or unless his or her parents or one of them should be or should have been parishioners or a parishioner of the parish for the time being exercising the right to elect or present; or in the event of there not being any candidate for election and presentation within such parish, then, unless he or she should have been born in, or unless his or her parents or one of them should be or should have been parishioners or a parishioner of a parish contiguous to or adjoining the parish whose turn and right it was to elect and present, nor unless such child should comply with and fulfil the general regulations for the time being in force for the regulation of the admission of children to *Christ's Hospital.*

The bill then stated that a child who became a candidate for election under the scheme as being related to the founders was commonly called a "claim child."

The Plaintiff was born in the parish of *Richmond,* being a parish adjoining *Twickenham* parish; his father, *James Etherington,* was related to the founders, and was born and brought up in the parish of *Twickenham.* Previously to Michaelmas, 1873, *James Etherington* for some years resided in and was a parishioner of *Richmond,* but about that time he took a house at and became a parishioner of *Twickenham,* and had ever since continued to be a parishioner of that parish.

On the 19th of December, 1874, a notice was issued by the churchwardens of *Twickenham* that a vestry meeting would be

held on the 31st of December for the purpose of laying before the vestry the taxed costs in the Chancery suit of *Etherington* v. *Vicar and Churchwardens of Twickenham*, and to take such steps in the matter as might be deemed advisable, and also for the purpose of electing a boy into *Christ's Hospital*, under the gift of Mr. *John West* and *Frances* his wife, in the room of *John Pope* rejected.

The Chancery suit referred to in the above notice was instituted by *James Etherington* in August, 1874, on behalf of his eldest son, for the purpose of establishing his right to be a claimant for election to *Christ's Hospital* under the scheme, which right some of the parishioners of *Twickenham* had refused to admit. Before the suit came to a hearing it was compromised upon the terms of the eligibility of the Plaintiff's son being admitted, and he was accordingly elected and presented to *Christ's Hospital*, and all the costs of the suit were to be paid to the Plaintiff.

On the 26th of December, 1874, *James Etherington*, on behalf of the Plaintiff, who was his second son, gave notice to the vestry clerk of *Twickenham* that the Plaintiff would be a "claim child" candidate for election into *Christ's Hospital*, and that the Plaintiff claimed to possess a threefold eligibility under the schemes as being, 1, the child of a parishioner of *Twickenham*; 2, a child born in a parish adjoining *Twickenham*; and, 3, the child of a parishioner of a parish adjoining *Twickenham*.

On the same 26th of December notice was also served upon the vestry clerk by *Henry Wilson*, the father of the Defendant *H. A. Wilson*, that the Defendant, who was related to *John West*, would be a candidate for election to *Christ's Hospital*.

On the 31st of December, 1874, a vestry meeting was held in pursuance of the above notice, when the Plaintiff *E. D. Etherington* and the Defendant *H. A. Wilson* were the only candidates for the election. The shew of hands was in favour of the Defendant, and a poll of the parishioners having been demanded by *James Etherington*, the election was declared on the 7th of January, 1875, to have been in favour of the Defendant, the numbers being 233 for the Defendant and 177 for the Plaintiff.

The bill then alleged that, in pursuance of inquiries made by *James W. Etherington* as to the eligibility of the Defendant to be

V.-C. M. 1875 ETHERINGTON v. WILSON.

elected, he had discovered that *Henry Wilson*, the father of the Defendant, was a tailor's foreman, working at a shop in *St. James's Street, Westminster*, and residing in *Tachbrook Street, Pimlico*, where he had lived for nine years. He had never had any connection with *Twickenham*, nor with any adjoining parish, but that immediately before the notice for an election to fill the vacancy for *Christ's Hospital*, and owing to the suggestion and contrivance of a parishioner of *Twickenham*, who was hostile to the Plaintiff's father in consequence of the transactions which led to the institution of the suit of *Etherington* v. *Vicar and Churchwardens of Twickenham*, he had taken a small house in the parish of *Twickenham*, in order to qualify his son for the election, but that such qualification was only colourable and fictitious, since there was no tenancy or occupation of the said house during any part of the month next preceding the 18th of December, 1874, either by *Henry Wilson* or any other person; at the most, some arrangement was come to that *Henry Wilson* might make use of the house and represent himself as tenant or occupier thereof just so long as he might find it convenient to do so in order to appear in the character of a parishioner of *Twickenham*; and further, that *Henry Wilson* had gone to the vestry clerk on the 26th of December, 1874, and had voluntarily paid the sum of 17*s.* 6*d.* for rates in respect of the said house, but that his name was not in the rate-book, nor had any application been made to him for payment of rates.

The bill further stated that on the morning of the 7th of January, 1875, before the opening of the poll, *James Etherington* served upon the vicar and churchwardens of the parish a protest against the election of the Defendant *H. A. Wilson*, on the ground that at the date of the nomination his father *Henry Wilson* was not a parishioner of *Twickenham*, and was not legally rated to the poor, and that if the Defendant was elected he should take such proceedings against them as he should be advised.

The bill prayed that it might be declared that at the time of the said election the Defendant *H. A. Wilson* was not eligible to partake of the benefits of the charity, and that the election was invalid; that the Plaintiff might be declared to have been duly elected, or if not, that a new election might be directed, and in the

meantime that the governors of *Christ's Hospital* might be restrained from admitting the Defendant *H. A. Wilson* to the benefits of the charity.

The institution of the suit was duly authorized by an order of the Board of Charity Commissioners.

The evidence in support of the facts as to the *status* of parishioner which was alleged by the Defendant *H. A. Wilson*, and on which alone he could be eligible as a "claim child," was to the following effect:—That *Henry Wilson*, the father of the Defendant, had some time previously to the date of the election made inquiries respecting the terms upon which his son, who was admitted to be one of the next of kin of the founder, could claim to be elected to the charity; that about a month before the notice that an election would take place he had called upon the vestry clerk, Mr. *Lane*, and requested him to ascertain whether there was a house in *Twickenham* which he could rent for the purpose of becoming a parishioner; that in pursuance of such request Mr. *Lane* made inquiries, and shortly afterwards informed him there was a house in *Back Road, Twickenham*, which he might rent at a sum of £18 per annum; and Mr. *Lane*, upon receiving instructions from *Henry Wilson*, entered into an agreement with Mr. *Stroud*, who was the agent for the owner of such house, by which *Henry Wilson* became the tenant for a term of three months at a rent of 30*s.* per month, with liberty to continue the tenancy, and to terminate it at any time by giving one month's notice; that *H. A. Wilson* had subsequently called upon Mr. *Stroud*, and received the key of the house; and that *Lane* had, on behalf of *Wilson*, paid *Stroud* 30*s.* for the first month's rent on the day previous to the nomination of candidates for election; that he had, after the day of such nomination, placed in the house various articles of furniture, and had on several occasions (the first being subsequent to the election meeting of the 31st of December, 1874) slept in the house, but had not otherwise occupied it since the day on which he became such tenant. It also appeared that on the 18th of December he had gone to Mr. *Lane*, the vestry clerk, and had required him to place his name on the ratepayers' book as a parishioner of *Twickenham*, and that Mr. *Lane* had written his name in the book in pencil, and received from him the sum of 17*s.* 6*d.* in respect of

V.-C. M. 1875

ETHERINGTON v. WILSON.

rates, and had subsequently entered his name fully in the rate-book as such parishioner.

There was evidence given by the Plaintiff that he had on two occasions posted letters to *Henry Wilson*, addressed to the house alleged to have been rented by him, and that such letters were returned through the Post Office with the words "not known" written thereon.

Mr. *Rawlins* (Mr. *Glasse*, Q.C., with him), for the Plaintiff:—

The only question for the decision of the Court is whether or not the Defendant *H. A. Wilson* was eligible to be elected for a nomination to *Christ's Hospital* under the scheme settled by the Court in 1868 for the regulation of this charity. It is admitted that he was one of the next of kin of the founder, but it is also requisite under the scheme that he should have been born in the parish of *Twickenham*, or that his parents, or one of them, should be or should have been parishioners or a parishioner of the parish for the time being exercising the right to elect; or, in the event of there being no child eligible within the parish, then that he or his parents should be or should have been parishioners of a contiguous or adjoining parish. The evidence in favour of the Defendant's father being a parishioner of *Twickenham* shews clearly that he took a house in the parish for three months for the mere purpose of obtaining a qualification for his son, and without any intention of residing in, or in any way occupying it. It is true that the Acts by which parish vestries are regulated (58 Geo. 3, c. 69, and 59 Geo. 3, c. 85) give the right of voting at vestries to the following classes, viz.: 1. Inhabitants who have been actually rated to the last poor-rate; 2. Persons who have become inhabitants or become liable to be rated since the making of the last poor-rate, if they consent to be rated; and 3. Persons, even non-residents, who have been rated to the poor in respect of any annual rent, profit, or value arising from any lands, tenements, or hereditaments in the parish. But the Defendant *Wilson's* father does not fall within any one of these categories. It must be admitted that as a general rule it is not necessary for a parishioner to be a resident in the parish: *Jeffrey's Case* (1); but the property must

(1) 5 Rep. 66 b.

be in his own proper occupation, and a casual sojourner will not do: *Steer's* Parish Law (1), citing *Holledge's Case* (2); and, further, in a case of this kind—a local charity for which parishionership is expressed to be the qualification—the sense and reason of the thing imply something more than mere non-resident occupation. Sometimes in analogous cases we find a resident qualification positively expressed: *Attorney-General* v. *Bovill* (3), and the recent Act of 37 & 38 Vict. c. 85, the *Public Worship Regulation Act*, which describes a parishioner to mean a person who has for one year had his usual place of abode in the parish. In the present case we have a right to assume that the Court intended there should be a reasonable period of residence. Such a period, for instance, as would be required for giving a legal settlement in the parish.

At several of our public schools there is a period of residence, usually a year, prescribed for every person who wishes to obtain the benefits of the foundation for his family.

We say that the election of the Defendant was void on the ground that he was not eligible to be a candidate, and that, consequently, all the votes given in his favour were thrown away, and the Plaintiff, who was the only other candidate, was actually elected. For this we have the authority of the *Braintree Case*, *Gosling* v. *Veley* (4); *Trench* v. *Nolan* (5); and the *Tipperary Election Case* (6).

Mr. *J. Pearson*, Q.C., and Mr. *Phillimore*, for the vicar and churchwardens of *Twickenham*:—

The word "parishioner" has frequently received a definite construction. In *Jeffery's Case* (7) it was held that the occupier of lands, though living out of the parish, is, in judgment of law, a parishioner, and may come to the assemblies of parishioners. And in *Attorney-General* v. *Parker* (8) it was said, "The word 'parishioner' is a very large word, and takes in not only inhabitants of a parish but persons who are occupiers of lands that pay the rates, though they are not resident."

(1) 3rd Ed. p. 21.
(2) 2 Roll. Rep. 238.
(3) 1 Ph. 762.
(4) 7 Q. B. 406.
(5) Ir. Rep. 6 C. L. 464.
(6) Ibid. 9 C. L. 217.
(7) 5 Rep. 66 b.
(8) 3 Atk. 576.

V.-C. M. 1875 ETHERINGTON v. WILSON.

It is provided by the Acts 58 Geo. 3, c. 69, and 59 Geo. 3, c. 85, for the regulation of parish vestries, that all inhabitants rated to the relief of the poor, whether resident inhabitants of the parish or not, are entitled to attend the vestries and vote thereat, and this right is extended by the 4th section of the former Act to all inhabitants coming into the parish since the last poor-rate if they consented to be rated: *Prideaux's* Churchwardens' Guide (1).

The Defendant's father, *James Wilson*, fulfils all the requisites to entitle him to be a parishioner.

If the Court should hold this election to be void, then we say that there should be a re-election, upon the authority of *Reg.* v. *Mayor of Tewkesbury* (2), where it was held that the mere knowledge on the part of the electors who voted for an unqualified candidate that he was not qualified, did not amount to a knowledge that he was disqualified in point of law, and therefore their votes were not thrown away.

Then as to the costs of the suit; in case the Court should decide in favour of the Plaintiff, we contend that this being a suit for the administration of the charity, and in order to direct the future elections under the charity, the costs ought to be paid out of the funds of the charity. This was done in *Carter* v. *Cropley* (3).

Mr. *Simmonds*, for the Defendant, *H. A. Wilson*, followed the same argument.

Mr. *Freeling*, for the governors of *Christ's Hospital*, submitted that, under any circumstances, the costs ought not to fall upon the charity, since the funds were solely devoted to the purposes of education; and there had been a guarantee given at the direction of the Charity Commissioners that the charity should not be subject to any costs occasioned by this suit.

SIR R. MALINS, V.C.:—

The Plaintiff was fully justified in instituting this suit in order to obtain the decision of the Court upon the question, but the proceedings have been extended to much too great a length. They

(1) Page 110. (2) Law Rep. 3 Q. B. 629.
(3) 8 D. M. & G. 680.

might have been brought into a small compass, and the costs would have been trifling, whereas now they will probably be very large. The allegation of the Plaintiff is that the election of *Wilson* was void, because his father was not a parishioner of *Twickenham*. The circumstances with regard to the father of the Plaintiff and the father of the Defendant are these: Mr. *Etherington* is a music seller at *Richmond*, and a year ago, upon the occasion of a vacancy occurring for the election of a boy to this charity, he took a shop at *Twickenham*, and set up there a branch place for the sale of music, in order to qualify himself as a parishioner of *Twickenham*, and his son, that is, his eldest son, being one of the next of kin to the founder and also a parishioner of *Twickenham*, was elected to the vacancy. It must be assumed that he took the shop at *Twickenham* for the purpose of qualifying for the election. I have nothing to do now with the circumstances of that election, but this is certain, that he has retained the shop ever since, and his daughter resides there, and the business is still carried on by a foreman. The authorities are clear upon this point, that for a man to become a parishioner in the ordinary meaning of the term it is not necessary for him to reside in the parish or to occupy a house in it; but he must be a ratepayer of the parish. The Plaintiff's son, therefore, has all the requisite qualifications for a candidate. He is one of the next of kin of the founder, and his father is a parishioner, though not resident in the parish.

On the other hand, the facts with regard to the Defendant, *Henry Arthur Wilson*, are these: It is admitted that he is of kin to the founder, but it is denied that his father is a parishioner. The real question is whether he is a parishioner within the meaning of the scheme settled by this Court. My opinion is, that the intention of the Court was that the scheme should be acted upon in a fair, *bonâ fide*, and honest manner. Mr. *Wilson* is, no doubt, a man of respectability, and though I feel bound to decide against him, there is nothing blameable in what he has done. It appears that for some time before the election in December last he had made inquiries about this charity, and not being a resident of *Twickenham*, and having no connection with the parish, he was

V.-C. M. 1875 ETHERINGTON v. WILSON.

desirous of qualifying himself in this respect, and for that purpose he got into communication with the authorities of the parish, and was much favoured by Mr. *Lane*, the vestry clerk, who seems to have had some ground of dislike to Mr. *Etherington*, arising probably from a suit having been instituted by that gentleman against the parish, the costs of which had fallen upon the vicar and churchwardens. From whatever cause this dislike arose, it seems that Mr. *Lane* did his best to procure a house for Mr. *Wilson*, in order that he might become a parishioner. The house taken by Mr. *Wilson* was in the management of Mr. *Stroud*, the son of the owner, to whom Mr. *Lane* applied on behalf of Mr. *Wilson*, and the house was taken for three months certain, and as much longer as Mr. *Wilson* pleased, subject to a month's notice to quit, in case the tenancy was continued, and the rent was to be 30*s.* per month. Mr. *Wilson* never went to reside in the house, although he says he has slept there on several occasions. It is even doubtful when the house was actually taken, for Mr. *Stroud* cannot recollect the date. However, the day before the vestry meeting was held for the election of a boy, Mr. *Lane* went to Mr. *Stroud*, and paid him 30*s.* for a month's rent on behalf of *Wilson*, and then, in order to make the matter more certain, *Wilson* went to *Lane* and asked him to receive a payment in respect of rates. That plan Mr. *Lane* went out of his way to carry through. He has stated that *Wilson's* name was inserted in the rate-book in pencil on the 18th of December, but I cannot help thinking that if the transaction had been perfectly fair, and if he had thought there was no objection, the entry in the book would have been boldly and openly made, but it seems the name was not inserted in ink until just before the election was confirmed by the parishioners. Then this sum of 17*s.* 6*d.* was paid for rates before they were even demanded, and the whole transaction was effected with the aid and connivance of Mr. *Lane*. The election took place on the 31st of December last, and it is certain that on that day the shutters of the house remained up, and it had not been occupied, but since the period of the election, Mr. *Wilson*, to give colour to the scheme, has kept possession of the house at *Twickenham*, and has put a few articles of furniture into it; it is also certain that he

was quite recently unknown as a resident in the parish, since several letters written to him by the Plaintiff were returned through the Post Office with the word "unknown" upon them. Nevertheless, Mr. *Wilson* would wish me to believe that he, a tailor's foreman, residing in *Westminster*, is keeping up a country house at *Twickenham*. By these colourable transactions he has been the occupier of a house in the parish since November; and though I agree with the authorities that a man may be a parishioner without residing in the parish, that cannot hold good unless he is a *bonâ fide* holder of property there. When, however, the Court is asked to decide whether Mr. *Wilson* was a parishioner at the time of the election, within the meaning of the scheme, all I can say is, that it was a mere colourable pretence, and I am satisfied that Mr. *Wilson* never intended to have any further connection with *Twickenham* than was absolutely necessary in order to get his son elected to this charity. Under those circumstances it is impossible for me to decide that such a colourable occupation brought him within the meaning of a parishioner, as described by the scheme. I am sorry that the scheme did not more definitely point out what a parishioner was, and if I had had the question brought to my mind, I should have inserted words making it necessary for a person to reside in the parish for a year before he was considered eligible, and I think that a petition ought to be presented for the purpose of having the scheme altered in that respect.

I consider that I am bound to look at the honest and proper meaning of the word as used in the scheme, and I would no more allow such a colourable attempt to evade the meaning of the word than I would if I were an election judge deciding upon the validity of a Parliamentary election. I must look at the honesty and fairness of the transaction, and my opinion is that the whole thing is a mere attempt to evade the scheme. I have no hesitation in saying it was altogether colourable and unfair, and that Mr. *Wilson*, in the honest meaning of the word, was not a parishioner of *Twickenham*.

Then as to the question whether a re-election is to take place. It appears that Mr. *Etherington* on the day of election issued a protest against the election of the Defendant *Wilson*, on the

V.-C. M. 1875

ETHERINGTON v. WILSON.

ground that at the date of the nomination his father was not a parishioner of *Twickenham*, and he was not legally rated to the poor of that parish. Although there was a majority of votes in favour of the Defendant, I must hold that all the votes given for him were bad. After that distinct notice those who voted for him were bound to make inquiries, and as the Defendant was not duly qualified to be a candidate they threw their votes away. That was the case in the late election for *Tipperary* (1), where the decision was not that of a single election Judge, but the solemn decision of all the Judges of the Common Pleas in *Ireland*, and there it was held that all the votes given for Mr. *Mitchell* were thrown away, and that Mr. *Moore*, who was the opposing candidate, was duly elected. I should have been sorry if I had felt myself bound upon the authority of *Reg.* v. *Mayor of Tewkesbury* (2) to have held this election void, since it would probably have given rise to much ill feeling in the parish if another election had taken place. That case, however, was totally different. There the disqualification was not so plain as it is here. The candidate was disqualified on a point of law which the electors might not have been supposed capable of appreciating, and therefore their votes were held not to have been thrown away.

I therefore come to the conclusion that the Plaintiff has succeeded in shewing that the Defendant was disqualified to be a candidate, and that he, being the only other candidate, was duly elected.

As to the costs of this suit, I feel some difficulty in deciding the question. I see no reason to suppose that the vicar and churchwardens acted from any other motive than that of settling a disputed point in the administration of the charity, and I think the Plaintiff was justified in instituting these proceedings; but, in my opinion, they have been conducted in such a manner as to increase the costs unnecessarily.

It would be useless to order the Defendant *Wilson* to pay the costs, and I do not think I should be justified in throwing the costs upon the charity. Therefore, upon the whole, I think the best decree to make will be that the costs of the charity should be

(1) Ir. Rep. 9 C. L. 217. (2) Law Rep. 3 Q. B. 629.

paid by the Plaintiff and added to his own; that the costs of the Plaintiff be paid by the vicar and churchwardens of the parish, but such costs to be taxed upon the "lower scale" applicable to suits under £1000, and that the Defendant *Wilson* should pay his own costs.

Solicitor for the Plaintiff: Mr. *Montagu Scott.*

Solicitor for the Defendant *Wilson:* Mr. *R. Hewlett.*

Solicitors for the Parish of *Twickenham:* Messrs. *Wright & Pilly.*

Solicitors for *Christ's Hospital:* Messrs. *Beachcroft & Thompson.*

V.-C. B.
1875
*May* 22, 27, 28, 29, 31; *June* 2.

## *In re* BRAMPTON AND LONGTOWN RAILWAY COMPANY.

### ADDISON'S CASE.

*Companies Act*, 1862, s. 109—*Winding-up—Contract of Indemnity—Authority of Agent.*

Under the jurisdiction to adjust the rights of the contributories amongst themselves given by the *Companies Act*, 1862, s. 109, the Court will not under the winding-up enforce an alleged contract by the promoters to indemnify persons signing the subscription contract against all liability in respect of the shares, by directing a call payable primarily by the promoters only.

The authority of the clerk of a solicitor engaged in getting up a railway company to bind the company by a representation to persons signing the subscription contract that they would not be called upon to pay anything unless the line was made and opened, discussed.

ADJOURNED SUMMONS on behalf of contributories under the winding-up of the *Brampton and Longtown Railway Company*, that the names of Messrs. *Shaw*, *Nimmo*, and *McNay*, be placed on a separate list of contributories for the number of shares appended to their names respectively in the list of contributories, and that the names of the applicants be also placed in a separate list of contributories for the number of shares appended to their names respectively on the said list; and that directions might be given for making calls on the contributories in the first of such separate lists in priority to those whose names should be placed on the second of the separate lists, and such other directions as might be necessary for adjusting amongst themselves the rights of the contributories whose names should be placed on such separate lists.

The material facts are stated in the report of *Shaw's Claim* (1), from which it appears that the *Brampton and Longtown Railway* was projected before 1865, and actively promoted by Messrs. *Dodds & Hendry*, the parliamentary agents; *Nimmo & McNay*, the engineers; *Shaw*, the solicitor; and *Boulton & Dodds*, railway contractors. *Waugh* and other owners of land along the proposed

(1) Law Rep. 10 Ch. 177.

line consented to allow their names to appear as provisional directors upon receiving from *Shaw, Nimmo,* and *McNay,* a written guarantee against liability for any expenses incurred prior to the passing of the Act.

During the progress of the bill through Parliament it was considered desirable to obtain signatures to the subscription contract as evidence of the pecuniary support given to the undertaking by persons residing in the locality through which the line was intended to pass, and also to meet the requisitions of Lord *Redesdale,* as Chairman of Committees.

*Shaw,* who was the solicitor to the undertaking, was actively engaged in procuring signatures to the subscription contract, and represented to *Waugh* that the contract, if signed, would not be used or acted on unless the line were made. On the faith of this representation, and on the repeated assurance by *Norris* (a clerk of *Shaw's*) that he (*Waugh*) should not be called on for a penny unless the line was made, and that the contract was only for the purpose of getting the bill safely passed, *Waugh* signed the subscription contract. The applicants (Messrs. *Addison* and others) who had signed the subscription contract, stated that they had been induced to do so by representations made to them by *Norris,* and his positive assurance that they should not incur any liability, or "be called upon to pay one penny of expenses" unless the line was made and opened, or unless the undertaking was carried out. The Act was passed in 1866, but it being found impossible to proceed with the undertaking the construction of the line was never commenced, and the undertaking was abandoned under 30 & 31 Vict. c. 127. In December, 1869, an order was made under 32 & 33 Vict. c. 114, for winding up the company.

Claims having been carried in under the winding-up by *Shaw* for professional services (£858), and by *Nimmo & McNay* for engineering work (£1000), these claims were resisted by *Waugh* and the other persons who had signed the subscription contract, on the ground that they had been induced to sign by the misrepresentations and assurances of *Shaw* and *Norris,* as agents of *Shaw, Nimmo,* and *McNay.*

The claims were allowed by Vice-Chancellor *Bacon,* and on the 11th of January, 1875, the Vice-Chancellor's decision was affirmed

V.-C. B. 1875 ADDISON'S CASE.

by the Court of Appeal (1), their Lordships being of opinion that the engagement, even if proved, was an engagement to indemnify the particular shareholders individually, and had not the effect of exonerating the company in its corporate capacity. In dismissing the appeal the following words were added, "But this order is to be without prejudice to any claim of the said alleged contributories which they may be advised to make on the ground of indemnity."

The names of *Waugh* and the other persons who had signed the subscription contract under the above stated circumstances having been placed on the list of contributories, the above summons had been taken out and was now adjourned into Court.

Mr. *Fry*, Q.C., and Mr. *T. L. Wilkinson*, for the applicants:—

A contract on the part of *Shaw, Nimmo*, and *McNay*, as promoters, to indemnify the persons whom they induced to sign the subscription contract against all liability in the event of the line not being made and opened, has been clearly established; and the Court will give effect to it and adjust the equities between the contributories by dividing the indemnifiers and the indemnified into two classes, and making a call in the first instance upon the indemnifiers only, and not upon the general body until the former class has been exhausted: *Lindley* on Partnership (2); *Companies Act*, 1862, s. 109. The representations shewn to have been made by *Norris* were made by *Norris* acting entirely within the scope of his authority as agent for the promoters, for the purpose of obtaining signatures to the subscription contract: and having been held out to the persons whose signatures were obtained as an agent having competent authority, his principals, the promoters, now represented by the company, are bound by the contracts made by him—"although, in fact, he has in the particular instance exceeded or violated his instructions, and acted without authority:" *Story* on Agency (3).

Mr. *Kay*, Q.C., and Mr. *Smart*, for *Shaw, Nimmo*, and *McNay*:—

We deny that there was ever anything amounting to a contract to indemnify the persons who signed the subscription contract

(1) Law Rep. 10 Ch. 177. (2) Pages 1473, 1474.
(3) § 443.

against any sums they might be called upon to pay in their character of shareholders; and it has been already stated in the Court of Appeal (1) that the evidence, even if accepted as uncontradicted, does not amount to anything entitling the applicants to say more than that there has been an engagement to indemnify them as individuals.

Any representation such as is alleged to have been made by *Norris* was not within the scope of his employment as agent, was in excess of the authority committed to him, and, even if authorized by any instructions from his principal, cannot have the effect of binding the company: *Western Bank of Scotland* v. *Addie* (2); *Collen* v. *Gardner* (3); *Duke of Beaufort* v. *Neeld* (4); *Story* on Agency (5).

But even assuming the existence of such a contract, and the authority of *Norris* to make it, there is no authority for making a call under the winding-up for the purpose of enforcing a mere collateral contract of indemnity. No such right can be asserted under the *Companies Act*, 1862, sect. 102, which gives the Court power to make calls "for the adjustment of the rights of the contributories amongst themselves," or under sect. 109: "The Court shall adjust the rights of the contributories amongst themselves, and distribute any surplus that may remain among the parties entitled thereto;" for the equity now asserted is not between contributories in that capacity, but in respect of a contract of indemnity alleged to have been given by persons who only subsequently became shareholders.

Even if such a contract could be enforced, the rights of the parties would not be adjusted, as the total amount payable on the shares of *Shaw*, *Nimmo*, and *McNay* would not be sufficient to satisfy the debts of the company already proved.

Mr. *Kay*, Q.C., and Mr. *Millar*, for the official liquidators.

Mr. *Fry*, in reply:—

1. Although it has been decided by the Court of Appeal that there was no contract which enured for the benefit of the com-

(1) Law Rep. 10 Ch. 182.
(2) Ibid. 1 H. L., Sc. 145, 157.
(3) 21 Beav. 540.
(4) 12 Cl. & F. 248.
(5) § 105.

V.-C. B. 1875

ADDISON'S CASE.

pany, the decision was expressly without prejudice to the question of indemnity to the particular shareholders.

2. It is said that at the utmost there has been a representation, and not a contract, but where a person makes a representation under circumstances which he must know will be laid before other persons who are to act on the faith of his representation being true, and who do act upon it, equity will bind him by such representation, treating it as a contract: *Maunsell* v. *Hedges* (1).

3. The Court has jurisdiction, as in the case of a partnership (where there has been an agreement by some of the partners to indemnify the others) to work out the equities between the parties by making such a call as will put all the different parties upon a rightful footing: *Re Marylebone Joint Stock Bank* (2).

SIR JAMES BACON, V.C.:—

In my opinion there is no ground upon which I can with safety accede to this application. On the former occasion, when, as has been truly said, the case of Mr. *Waugh* was that misrepresentation had been made to him, I was satisfied that no misrepresentation had been made. The case afterwards went to the Court of Appeal, and there, as has been truly said and was agreed on both sides, the decision went on the ground that if all that was stated in the affidavits were true that amounted to no more than an engagement to indemnify certain persons as individuals. Whether there had been such an engagement or not the Lord Chancellor and the Lords Justices forebore to express any sort of opinion.

Upon the facts of the case I am of opinion that it was out of all possibility or plausibility to suppose that any person who signed that contract signed it on the understanding that he was to acquire the property which the shares would represent without the disbursement of a shilling or the liability to contribute a shilling. But, even assuming these representations to have been made, *Norris* was merely an attorney's clerk sent down for a special purpose clearly defined, with an authority to do all that was requisite in the character of an attorney's clerk to procure signatures to the subscription contract. No doubt he expressed

(1) 4 H. L. C. 1039, 1055. (2) 25 L. J. (Ch.) 650.

himself very favourably towards the undertaking; but what authority had he to say, "On behalf of my master, and on behalf of the persons who are associated with him as promoters of the undertaking, I agree to hold you harmless from all the consequences of signing this contract. More than that; I agree that if you should be called upon to pay any money, and shall pay it, my master and the others shall pay it back again." For such an authority there must be some proof. Proof there was none, and it was denied that any such authority was given. It would be unsafe and unjust in the highest degree to adopt the conclusion of these applicants, and hold that they were entitled in the winding-up of this company to have the performance of what they called the indemnity entered into by these three persons enforced.

Then the question of jurisdiction is raised, and upon the policy of the *Winding-up Act, Re Marylebone Joint Stock Bank* (1) is referred to; but that case, in my opinion, has no application at all, because upon general principles of equity, in a common partnership, if there were equities to be ascertained and determined between the parties to the partnership, the Court would find the means of doing that. The applicants say that they have got a contract of indemnity, and have a right to enforce it. No one says that if they have a contract for indemnity they are not entitled to enforce it. The law is open to them; but are they entitled to enforce it under this winding-up? The Act has said that the rights of the parties shall be determined and settled, and the rights alleged do not arise out of this winding-up. The subscription contract having been entered into, the undertaking is not carried on for some reason or other. But if the case of the applicants were established ever so much, what has that to do with the winding-up? In my opinion it does not come within the words or the meaning of the statute. And if I entertained any doubt about that, I should still, considering the danger of making a precedent of that nature, hesitate very much before I made an order; inasmuch as the right of working out the indemnity, as it is called, in the winding-up might with equal plausibility be extended to any other right of action in tort, trespass, debt, or other proceeding. I do not think that was the meaning of the Act of Parliament; but I think the meaning is

(1) 25 L. J. (Ch.) 650. 2 Jur. N. S. 1216

V.-C. B. 1875 ADDISON'S CASE.

sufficiently apparent, and the case before Vice-Chancellor *Kindersley* is a strong illustration of it, that if in the course of the transactions which have taken place between the parties there arise any special equities, those can be arranged in the winding-up. But to introduce sixty actions for indemnity, and have them determined (how they are to be determined I cannot tell), is, in my opinion, not within the meaning of the Act of Parliament. Although the suggestion is at least ingenious, and it may be said to be in some sense plausible, the contrivance of making separate lists, the object being to cast the burden on the persons who should thereby become liable to contribute in the first instance, viz., the present respondents, ought not, I think, to be adopted. In my opinion, I cannot and ought not to accede to the application now made, and I therefore dismiss the summons with costs. It will be understood that my refusal to entertain this claim under the winding-up does not prejudice, or alter, or affect in the slightest degree any right of action that any of these parties may have against any person they may choose to sue, but I will not put such words into the order.

Solicitors: Mr. *J. Thomson;* Messrs. *Tahourdins & Hargreaves;* Messrs. *Ashurst, Morris, & Co.*

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V.-C. B. 1875 *June* 10, 11.

## ATTORNEY-GENERAL *v.* HACKNEY LOCAL BOARD.

[1874 A. 92.]

*Injunction—Pollution of Stream—Metropolis Management Amendment Act,* 1862 (25 & 26 *Vict. c.* 102), *s.* 106—*Notice of Proceeding.*

The provisions of 25 & 26 Vict. c. 102, s. 106, requiring one month's notice to be served before instituting any proceeding against the Metropolitan Board of Works or any district board in respect of anything done or intended to be done under their Parliamentary powers, do not affect the right of a riparian owner, whose stream is being polluted by the drainage works of a district board, to summary relief by injunction.

The authority over sewers, and the drainage powers given by Parliament to local boards, do not authorize the committal of a nuisance by the boards in their exercise of such powers.

THIS was an information at the relation of *J. M. Yetts*, of *Marsh House*, in the parish of *Hackney*, for the purpose of restraining the

Defendants, the *Hackney* Local Board, from draining into or connecting any sewer with a stream called the *Marsh Brook*, which runs from *Lea's Dock* through *Hackney Marsh* and ultimately empties itself into the *Thames*, bounding on the east and south of the Plaintiff's property, which consists of eight acres of land occupied by a dwelling-house, orchard, garden, and paddocks.

The case made by the information was that the *Marsh Brook* in its original state was a stream of clean, wholesome water, full of small fish, with watercresses growing in the stream and flags on the banks.

The Defendants, the *Hackney* Board of Works, were a local board incorporated under the *Metropolis Local Management Act*, 1855, and the several Acts in connection therewith.

About five years back the Defendants, having been restrained by injunction from pouring sewage from their district into the River *Lea*, turned a sewer into the head of *Marsh Brook* at *Lea's Dock*, and had more recently made use of the brook as a sewer for draining a collection of new houses (*Buccleuch Terrace*) which had been built in the district near the *Marsh Brook*. The result of these operations had been to convert the clean and wholesome water of the brook into a foul black fluid loaded with sewage matter, emitting an overpowering stench, and causing an abominable nuisance and serious risk to the health of the relator and his family and the inhabitants of the immediate neighbourhood.

The existence of a nuisance was in effect admitted by the Defendants, but the case raised by the answer was that the *Marsh Brook* had long ceased to be a watercourse, and was in reality a sewer, and as such placed under their control by the *Metropolis Local Management Act*, 1855, and always so treated; and that they had only acted in accordance with the duty imposed by the Local Management Acts in draining into it the sewage from new houses in the district.

The Defendants also alleged that there had been undue haste, want of notice, and absence of inquiry before taking these proceedings on the part of the relator, who might have ascertained that steps were being taken, in conjunction with the Metropolitan Board of Works (now nearly carried out), which, by diverting the sewage into the *Hackney Brook* sewers under the control of

V.-C. B. 1875

ATTORNEY-GENERAL v. HACKNEY LOCAL BOARD.

the Metropolitan Board of Works, would abate the nuisance effectually.

The absence of one month's notice before commencing these proceedings, as required by the *Metropolis Management Amendment Act*, 1862 (25 & 26 Vict. c. 102), s. 106 (1), was also relied on as a fatal objection to the suit.

Mr. *Kay*, Q.C., and Mr. *E. Chisholm Batten*, for the informant and relator:—

1. The *Marsh Brook*, being a natural stream or watercourse formed by the drainage of pasture land, is not a sewer within the meaning of the *Public Health Act* (11 & 12 Vict. c. 63), so as to give the local board the right to pour the sewage of the district into it: *Reg.* v. *Godmanchester Local Board* (2).

2. The evidence shews that a nuisance, rendering the enjoyment of life and property uncomfortable to the relator and his family, has been created by the operations of the Defendants in draining into the *Marsh Brook*: *Rex* v. *White* (3); and even though the brook may not have been an absolutely pure stream before *Buccleuch Terrace* was drained into it, the Court will restrain the Defendants from increasing and continuing the nuisance created by their operations: *Attorney-General* v. *Leeds Corporation* (4).

Mr. *Eddis*, Q.C., and Mr. *Solomon*, for the Defendants:—

1. *Marsh Brook* is a sewer, and as such became vested in the Defendants under the Public Health and Metroplis Local Management Acts, with full authority and under the obligation to use it for the purpose of draining the district; and the Court will not

(1) "No writ or process shall be sued out against or served upon, and no proceeding shall be instituted against, the Metropolitan Board of Works, or any vestry or district board or their clerk, or any clerks, &c. . . . or any person whomsoever acting under their or any of their directions, for anything done or intended to be done under the powers of such board or vestry under the said Acts or this Act, until the expiration of one calendar month next after notice in writing shall have been served upon such board or vestry . . . And upon the trial of any action the Plaintiff shall not be permitted to go into evidence of any cause of action, except such as is stated in the notice so served or delivered; and unless such notice be proved the jury shall find for the Defendant."

(2) Law Rep. 1 Q. B. 328.

(3) 1 Burr. 334.

(4) Law Rep. 5 Ch. 583.

interfere with the Defendants in the exercise of the duties imposed upon them by the Legislature.

2. The relator has proceeded with undue haste, as steps are being taken to connect the drainage of the district with the *Hackney Brook* sewer as soon as that sewer shall have been completed by the Metropolitan Board of Works—who, as we submit, are necessary parties to the suit—instead of draining into the *Marsh Brook*.

3. We submit that the relator was bound, before instituting this suit, to have given the one month's notice required by 25 & 26 Vict. c. 102 (*Metropolis Management Amendment Act*, 1862), s. 106, before any proceedings can be taken in respect of acts done under the statutory powers given to the Metropolitan Board of Works or a local board; and as he has not complied with the requirements of the statute, his suit must be dismissed: *Poulsum* v. *Thirst* (1).

SIR JAMES BACON, V.C.:—

I think that the relator has established his title in this case, and that the Attorney-General has shewn his right to institute the suit. It has been objected that no notice of an intention to commence proceedings has been given as required by sect. 106 of 25 & 26 Vict. c. 102. The policy of the law is, that if these public bodies, entrusted with powers for public purposes, in the course of executing those powers shall happen to commit any inadvertence, irregularity, or wrong, then before anybody has a right to require payment from them in respect of that wrong they shall have an opportunity of setting themselves right; they shall have the period of a month for the purpose of making amends, or for restoring if they have taken away anything, and for paying for if they have done, any damage. That is the meaning of this clause. But what is there in it which excludes the authority of the Court of Chancery? If we give to any proceedings contemplated by that clause the widest signification which can be desired, what has that to do with the speedy remedy which the law has given to a man who complains of an injury which can be best redressed by an injunction? If he were to wait for a month the wrong of which

(1) Law Rep. 2 C. P. 449.

V.-C. B. 1875 ATTORNEY-GENERAL v. HACKNEY LOCAL BOARD.

he complains might be irreparable. The use of an injunction is to restrain a wrong which is in progress, something which is threatened; and although in this case there has been no application for an interlocutory injunction, that is because of the nature of the defence which is set up by the Defendants' answer. The case of *Poulsum* v. *Thirst* (1) is a plain illustration of what I am saying. There an action was brought against a contractor employed by the Metropolitan Board of Works for damages sustained by his negligence in executing certain works. An injunction would have done no good then; it was not a case for an injunction. He had made a mistake in the construction of the works, the consequence of which was that water flowed in to the injury of the Plaintiff. There was no injunction; the thing was done; an injunction would have been useless. But the relator in this suit was bound to apply by injunction if he thought he had not sufficient redress by bringing an action for damages. If I held that where a man has an equitable title to the interposition of this Court by way of injunction—the speedy present remedy that is provided here—he is prevented from asserting that right by reason of sect. 106 of the *Metropolis Management Amendment Act*, 1862, it would be the first time that such an objection has succeeded, though not the first time that it has been raised. I think the contention cannot be sustained.

As to the main part of the case, it seems to be a very reasonably plain one. It is proved by unquestionable evidence that for years this watercourse contained pure water, not the most pure that could be got, but in such a state of purity that it was nothing like a public nuisance, that it was useful for the cattle who might drink of it, and was enjoyed by the persons whose lands bounded either side of it. Of late years its character has been totally changed. About five years ago the whole of the sewage from a place called *Buccleuch Terrace* was turned into this water with the sanction and by the authority of the Commissioners of Sewers and by the present Local Board of Health; and the effect of that is described in the reports which were made to the local board by their officers, one of whom calls it "an elongated cesspool," while another says that it is foul and filthy to the last degree.

(1) Law Rep. 2 C. P. 449.

The Act of Parliament gave to the Local Board of Health all authority over all sewers, and more than that, it gave power to direct how sewers should be constructed, how houses should be drained; and if *Buccleuch Terrace*, or any other newly-built houses besides *Buccleuch Terrace*, required to be drained, the Local Board of Health would have power to say how that drainage was to be effected; but what power had they under the Act of Parliament, or in common sense or common justice, to say that because more houses have been built in the district they will add to the nuisance and injury already experienced to some extent? Having the power to construct drains, or to make the owners of houses construct drains in any way they choose to prescribe (and their powers in that respect are enormous), instead of exercising those powers, they drain the drains from *Buccleuch Terrace* and permit anybody else who built houses upon the bank to drain their drains into this watercourse. That is not the meaning of the Act of Parliament. That is not an exercise of the powers which the Commissioners of Sewers have. I am not desirous to limit their powers in the slightest degree, for the Legislature has decided that they shall have very extensive powers; yet the Legistature has not decided, and the law will not countenance, the proposition (which indeed has not been argued on the part of the Defendants), that they are authorized to commit a nuisance. I think, therefore, that the relator is entitled to the relief which he asks, to prevent the Defendants, who have the powers of dealing with the sewage in any way they think fit according to law, provided they do not commit a nuisance, from continuing that which they themselves say and prove is a very foul nuisance.

There might have been some colour for the objection that the relator has been hasty in his proceedings if the Defendants had raised that case by their answer, and therein stated that they were doing all they could to remedy the evil in conjunction with the Metropolitan Board of Works, and were doing it when the bill was filed. But the Defendants put in an answer in which they insist upon their legal rights, and say that they have done nothing that the Court ought to restrain them from doing, or for which the relator can have any ground of complaint. If they choose to bring the cause to a hearing in that state, in my opinion their complaint,

V.-C. B. 1875 ATTORNEY-GENERAL v. HACKNEY LOCAL BOARD.

that they had not notice of his intention to file a bill, loses all its point and force.

There must be an injunction according to the prayer of the information; the operation, except as to that part which prevented the Defendants from making any new communications being suspended until the 28th of July, 1875, and the Defendants must pay the costs of the suit.

Solicitors: Mr. *J. Muskett Yetts;* Messrs. *Ellis & Crossfield.*

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V.-C. B. 1875 *June* 21.

## BATLEY *v.* KYNOCK.

[1873 B. 178.]

*Practice—Patent Suit—Bill dismissed by Plaintiff before Hearing—Costs—Scientific Witnesses—Model—*15 & 16 *Vict. c.* 83, *s.* 43.

In a suit to restrain the infringement of a patent, the Plaintiff, shortly before the hearing, obtained the common order to dismiss the bill with costs.

Amongst the items in the Defendant's bill of costs were charges for drawing particulars of breaches, and having the same settled by counsel, which the Taxing Master had allowed; charges for remuneration of scientific witnesses, which the Master had reduced; and a charge for the construction of a model, which the Master had also reduced.

Upon summons by Plaintiffs to review the taxation:—

*Held*, that the 43rd section of the *Patent Law Amendment Act*, 1852, had no application to the case of a Plaintiff dismissing his own bill before the hearing; that the allowance of remuneration to scientific witnesses was part of the ordinary practice; and that the expense of having a model made might also be allowed.

Observations on the powers and duties of Taxing Masters of Courts of Equity.

### ADJOURNED SUMMONS.

The bill was filed to restrain the alleged infringement of an alleged patent for the manufacture of cartridges.

The 19th of February, 1875, was fixed for the trial of the issues. Briefs were delivered; but on the 12th of February the Plaintiffs obtained the common order at the Rolls, dismissing their bill with costs.

The costs were taxed as between party and party; and objections were taken, the nature of which, and the Taxing Master's

observations thereon, appear by the following extract from a statement signed by the Master :—

"The first objection taken to the taxation is as to the allowance of drawing particulars of breaches and settling same by counsel, on the ground that by the 15 & 16 Vict. c. 83, s. 43, it is provided that the 'Plaintiff and Defendant respectively shall not be allowed any costs in respect of any particular unless certified by the Judge before whom the trial was had to have been proved by such Plaintiff or Defendant respectively, &c.'

"I have allowed such charges as being properly costs of suit, as the Defendants, by the course taken by the Plaintiffs dismissing their own bill, had no opportunity of applying for the certificate.

"The second objection refers to the payments made to scientific witnesses.

"It is the practice in equity to allow a proper remuneration to scientific witnesses, but great care is necessary in dealing with such charges in party costs. In this case, Mr. *Imray* charges £61 12*s.*; I have allowed him £15 15*s.* Mr. *Mallett* charges £35 3*s.* 6*d.*; I have allowed him £15 15*s.* Mr. *Lancaster* charges £10 10*s.*; I have allowed him £5 5*s.*

"Objection 3 is as to a model prepared for the hearing.

"Mr. *James* charges for it a sum of £32 10*s.* Having examined the account, I consider a sum of £10 10*s.* is a proper allowance for the model.

"Dated the 31st day of May, 1875,

"*Charles F. Skirrow.*"

The Plaintiffs took out a summons, dated the 8th of June, that it might be referred to the Taxing Master to review his taxation in respect of the above items of charge, which, as the applicants were advised, he had wrongly allowed.

Mr. *Locock Webb*, in support of the summons:—

That this Court will adopt the rule followed at common law, appears from *Nokes* v. *Gibbon* (1); *Morgan* and *Davey* on Costs (2).

The rule as prescribed by the 43rd section of the *Patent Law*

(1) 5 W. R. 216; 26 L. J. (Ch.) 208. (2) Page 29.

V.-C. B. 1875 ~~ BATLEY v. KYNOCK.

*Amendment Act* (15 & 16 Vict. c. 83), is, that without a Judge's certificate there can be no allowance of costs: *Honiball* v. *Bloomer* (1); *Chitty's Archbold's* Practice (2).

Secondly, as to the scientific witnesses, a scale is laid down in *Chitty's Archbold's* Practice (3), according to which an engineer and surveyor, or professional man, receives £1 1s. a day: *Nokes* v. *Gibbon* (4). The common law rule has been repeatedly followed in equity: *Clark* v. *Gill* (5); *Brocas* v. *Lloyd* (6); *Wiltshire* v. *Marshall* (before Vice-Chancellor *Wood*, Feb. 16, 1860); *Turner* v. *Turner* (7). It would be monstrous to pay scientific witnesses for perusing specifications, that is to say, getting up the Defendant's case, or, in other words, learning their own business. On this point *Smith* v. *Buller* (8) may be relied upon by the other side; but it is submitted that it is not the practice of the Court to allow seven and a half guineas a day to scientific witnesses; especially in a case like the present, in which it was observed by the Court on a former occasion (9) that "the very thing in dispute, which is no bigger than one's thumb, is not a complicated machine."

The same remark applies to the third point, namely, as to the model. No case can be cited in which a charge for constructing a model has been allowed. Such an outlay falls within the observations of Vice-Chancellor *Malins*, who says (10), that charges merely for conducting litigation more conveniently, may be called luxuries, and must be paid by the party incurring them. As in that case, which was one of drawings, it may be said here that a model, however convenient, is not necessary.

Mr. *Swanston*, Q.C., and Mr. *E. C. Willis*, for the Defendants, were not heard.

SIR JAMES BACON, V.C.:—

The questions of practice which have been discussed are of con-

(1) 10 Ex. 538.
(2) 12th Ed. p. 496.
(3) 11th Ed. p. 1775.
(4) 5 W. R. 216; 26 L. J. (Ch.) 208.
(5) 1 K. & J. 19.
(6) 23 Beav. 129.
(7) 7 W. R. 573.
(8) Law Rep. 19 Eq. 473, 476, 478.
(9) Ibid. 232.
(10) Law Rep. 19 Eq. 475.

siderable importance and of not unfrequent occurrence, and I consider them to have been not unsatisfactorily raised by this summons.

With regard to the rule at common law, I cannot regard that rule as binding upon this Court. It may, no doubt, help to point out what should be the course of practice of this Court; it may be very satisfactory as a guide. It may so recommend itself to Courts of Equity as that they may adopt it; but I cannot admit that there is such a similarity between the procedure of this Court and that of a Court of Common Law as that the same rule of practice must necessarily prevail in both.

In this Court a different rule exists from that which prevails at common law. This Court requires the Taxing Master to conform to the law of the Court, but leaves to him a wide discretion as to details; reserving to itself, nevertheless, the right and duty of deciding upon any question of principle.

When reference is made to the statute, which is very often cited in cases of this kind, regard must be had to the circumstances of the case. In the ordinary course, when a Plaintiff carries the material issues in the cause before a Judge, a verdict is given upon the issues so tried. That might have been so in this case; but it did not so happen. The Plaintiff in this instance applied to dismiss his own bill. Before he did that, however, the Defendant had been doing no more than the law allows him to do; no more than the necessities of the defence required should be done. He had indulged in no "luxuries" like those of which Vice-Chancellor *Malins* spoke, in the passage (1) which has been read by Mr. *Webb*. The suit, no doubt, was to restrain the infringement of a patent; but that did not displace the right of the Defendant to raise objections to the validity of the patent. To say that the Defendant was not entitled to avail himself of such a defence would be tantamount to striking out of a Defendant's answer one of the grounds of defence on which he relies.

At the same time, this, and every other proceeding in the cause, is as to costs a matter for the discretion of the Master. If the Master finds the Defendant multiplying his defences, or prolonging them unnecessarily, and incurring expenses by so doing, he

(1) Law Rep. 19 Eq. 475.

V.-C. B. 1875

BATLEY v. KYNOCK.

will, in the exercise of his discretion, disallow the charges arising from such a course of conduct.

Upon the first point, I cannot say that the Master, in refusing to disallow the Defendants' costs of preparing their defence, was wrong, on the ground that the Act of Parliament has said that neither party shall be allowed costs unless the same are certified by a Judge. Here the state of circumstances contemplated by the statute never did, and never could, arise. The case referred to at common law, *Honiball* v. *Bloomer* (1), has no application to the present. There the action was brought into Court, and when it came to be tried, the Plaintiff found he had no case, and elected to be nonsuited. In the present case, up to the moment when the Plaintiff chose to dismiss his own bill, the Defendant was bound to be on the *qui vive*, and to be prepared with every sort of defence he could lawfully use. That authority has no application to the case before me. Here, if the client upon taxation had complained to the Master that the charge was unreasonable, that the defences were too long, too numerous, or too manifestly untenable on the face of them, I believe that the Master would, because I know that he ought to, have taken such a complaint into his consideration. When, therefore, I find that the Master, having the papers before him, having the parties before him, and having the whole case explained to him, has allowed these Defendants their costs of preparing their defence, I do not feel myself at liberty, in accordance with the practice of the Court, to dissent from his conclusion. The only authority to which I am bound to submit is that which decides that in a case where a Plaintiff has come into Court and has been nonsuited, and the Judge has not certified for costs, in such a case no costs can be allowed to the Defendant. But that authority does not apply here; and hence, upon the first point raised by the summons, I cannot interfere.

The next question is, as to the employment of scientific witnesses. Mr. *Webb* has referred to some remarks which fell from me on the occasion of the interlocutory application (2), when the Defendants moved that the Plaintiffs should deliver further particulars of breaches, and I remarked that the thing in dispute was no bigger than one's thumb, and was not a complicated machine.

(1) 10 Ex. 538. (2) Law Rep. 19 Eq. 229, 232.

V.-C. B.
1875
BATLEY
v.
KYNOCK.

One of the questions being whether the Plaintiffs should be allowed to inspect the works where the Defendants' machine was made, I thought the article itself, which was made an exhibit, was so simple, that it signified little or nothing by what machinery it was made, and that there was no ground for permitting the Plaintiffs to enter the Defendants' workshops and ransack his apparatus. But when scientific witnesses come forward and prove that it is necessary, in order to point out the difference between the article made by the Defendants and that made or sold by the Plaintiffs, to describe the mode by which the Defendants perform their operations; when the only way of doing that is to shew in what respects the Defendants' machinery differs from that of the Plaintiffs; and when that difference can be explained to the Court only by experts—that is to say, only by mechanicians who understand the machines—then that such scientific evidence is admissible on the part of the Defendants in order to displace the case made by the Plaintiffs is a doctrine of too old standing in this Court to be questioned now. In the case which has been referred to, Vice-Chancellor *Malins* (1) plainly assumes that it is the practice to allow a proper remuneration to scientific witnesses. Moreover, how can I depart from that which the officer of the Court—possessing, and deservedly possessing, the confidence of the Court—reports to me as being the rule of the Court, when he says "It is the practice in equity to allow a proper remuneration to scientific witnesses?" But then he adds: "But great care is necessary in dealing with such charges in party and party costs." Then the Master's attention seems to have been particularly drawn to the details, and he does not take the Defendants' charges at their own estimate, for he proceeds to make the following deductions:—[His Honour read the deductions.] What is the office of a scientific witness in giving evidence in this Court? His office is to point out and explain the mechanism by which power is applied, and the means whereby mechanical effects are produced. To that task he brings special knowledge. I am bound to suppose that scientific witnesses before they come here have duly informed themselves on the subjects on which they are required to give evidence—that they do not come here, as has been said, to learn their trade—but

3 C.P.D. 2

(1) Law Rep. 19 Eq. 475.

V.-C. B. 1875 BATLEY v. KYNOCK.

that, being masters of their trade, they are able, by comparison and experience, to tell the Court that there is, or that there is not, that similarity between the two articles in question which has been alleged.

The Master, then, has adopted the rule of Courts of Equity, and has exercised his discretion. In the exercise of that discretion he has reduced the charges of the scientific witnesses—in one instance to one-fourth, in another by one-half—and in so doing I cannot assume otherwise than that he has governed himself by the necessity of dealing with the question with the utmost care.

Then there is the further question about the model. In cases of patents, where scientific evidence is brought in, the use of a model is in many instances indispensable. Very often neither the Plaintiffs nor the Defendants can put their case before the Court at all without the assistance of a model. Even when not indispensable, it is often eminently useful, without laying either party open to the charge of indulging in the luxuries of which Vice-Chancellor *Malins* spoke.

Of what use the model might have been in this case I cannot tell; but I find that the Master has reduced the charge for making it from £32 10*s.* to £10 10*s.*; and I think it is impossible for any one now to say that if the issues had been tried, the model might not have been found useful.

Upon the whole, I think there has been no miscarriage; and that there is no pretence for saying that the Master has departed from the practice. He has applied his discretion to the subject, and in no one particular do I find that I can disturb his conclusion.

The Defendants must have their costs of the summons.

Solicitors: Messrs. *Stibbard & Cronshey;* Messrs. *Treherne & Wolferstan.*

## *In re* UNITED PORTS AND GENERAL INSURANCE COMPANY.

V.-C. B. 1875 July 1.

### BROWNE'S CASE.

*Practice—Inrolment—Winding-up—Delay and Acquiescence.*

In November, 1871, *A.* was settled by the Court upon the list of contributories of a company in course of liquidation. Notice of appeal from the order was given on behalf of *A.* within twenty-one days, but afterwards withdrawn, and no further steps were taken during *A.*'s lifetime to dispute his liability. From June, 1871, until his death, in December, 1874, *A.* was out of the jurisdiction, but notice of all proceedings under the winding-up was received by his solicitors, and a call was paid on his behalf.

An application, after *A.*'s death (December, 1874), by his mother (who had acted on his behalf in the affairs of the winding-up, but was not his legal personal representative), for leave to inrol the order of November, 1871, with the view of an appeal to the House of Lords, was refused, on the ground that *A.*'s absence from *England* did not countervail the long delay during which the winding-up had proceeded on the footing that all intention by *A.* to contest his liability had been abandoned.

ADJOURNED summons on behalf of Mrs. *Browne*, the mother of a deceased contributory of the *United Ports and General Insurance Company*, that notwithstanding the time allowed for that purpose by Cons. Ord. XXIII. r. 25, had expired, the order made in this matter by Vice-Chancellor *Bacon*, dated the 18th of November, 1871, might be signed and inrolled *nunc pro tunc*.

Mr. *Browne* was a shareholder in the *Bristol Marine Insurance Company, Limited*, and on his application 250 shares in the *United Ports Company* were allotted to him in pursuance of the arrangements entered into between the two companies, in March, 1869, for an amalgamation, and his name was placed on the list of members of the *United Ports Company* share register. The *United Ports Company* was ordered to be wound up on the 6th of November, 1869.

On the 4th of May, 1870, *Browne's* name was included in the list of contributories carried into Chambers by the official liquidator. *Browne* disputed his liability, and the question was adjourned into Court. On the 18th of November, 1871, an order was made by Vice-Chancellor *Bacon* placing him on the list of contributories.

V.-C. B. 1875 BROWNE'S CASE.

On the 8th of December, 1871, notice of motion by way of appeal was served, on behalf of *Browne*, on the official liquidator.

Before the appeal came into the paper it was proposed, on behalf of *Browne*, by way of compromise, to pay £5 per share in discharge of all liability, and this offer was subsequently increased to £7 per share. The matter was discussed in Chambers in March, 1872, but the Chief Clerk declined to sanction the proposal, which accordingly was never acted upon.

On the 8th of April, 1872, *Browne's* appeal was withdrawn, on payment of costs, and from that time until his death no step whatever was taken by *Browne* for the purpose of disputing his liability.

The certificate of the settlement of *Browne's* name upon the list of contributories was dated the 31st of May, and filed on the 9th of June, 1872.

On the 1st of July, 1872, a call of £1 per share was made, which call was paid on behalf of *Browne*.

On the 19th of February, 1873, an order was made for payment by *Browne*, and other contributories, of certain moneys with which, though in reality unpaid, their shares were credited in the books of the company.

On the 10th of July, 1874, a further call was made of £5 per share.

On the 8th of December, 1874, an order for payment of this call was made on *Browne*, and other contributories.

*Browne's* solicitors attended the summonses upon which these several orders were obtained, and a considerable correspondence passed between the solicitors of *Browne* and of the official liquidator as to the affairs of the liquidation, and the position of *Browne* as a contributory.

On the 23rd of December, 1874, *Browne* died on his way to this country from *America*, where, as his mother, the present applicant, stated in an affidavit filed by her in February, 1872, in reference to the proposed compromise, he had been ever since June, 1871, without any intention of returning to *England* until the question of his liability as a contributory had been disposed of.

Administration to *Browne's* estate and effects had been granted to his widow, but it was alleged that by reason of ill health she was at present unable to make any affidavit in these matters.

V.-C. B. 1875 BROWNE'S CASE.

Mrs. *Browne*, the mother of the deceased contributory, in her affidavit in support of her present application, stated that her son was in *America* when the order of November, 1871, now sought to be inrolled, was made, and also when the notice of appeal was withdrawn, such appeal having been discontinued, and the call of £1 per share paid by her directions in the absence of her son from this country. At the time of the appeal being withdrawn, a suit to set aside the amalgamation was pending, which was afterwards stayed by arrangement between the Plaintiff and the official liquidator of the *United Ports Company*. Mrs. *Browne* stated her belief that if this suit had been proceeded with her son's alleged liability as a contributory would have been most materially affected; but this was denied by the official liquidator.

Mrs. *Browne* also stated that her son's administratrix was advised that there were good grounds for appealing against the order of November, 1871, and that it was her duty to appeal therefrom; and, further, that the present application for leave to inrol was made *bonâ fide*, and not for the purpose of delay.

Mr. *Fry*, Q.C., and Mr. *Ingle Joyce*, in support of the application:—

The burden of shewing some good and sufficient cause why the order of November, 1871, should not be inrolled is thrown upon the official liquidator, the party resisting the application: *Kay* v. *Smith* (1). Mere lapse of time is no sufficient ground for refusing leave to inrol within the five years, nor will the fact that the official liquidator has dealt with the assets on the footing of *Browne* remaining liable as a contributory under the order of November, 1871, conclude the discretion given to the Court by Cons. Ord. XXIII. rr. 25, 26: *Chapman* v. *Brown* (2). The period fixed by the *Companies Act*, 1862, s. 124, for giving notice of appeal is twenty-one days, unless such time is extended by the Court of Appeal; but the power of extending the time may be exercised after the twenty-one days has expired: *Banner* v. *Johnston* (3). All that we now ask is to be enabled, by inrolling the order of this Court,

(1) 7 D. M. & G. 383. (2) 15 W. R. 474. W.N.(1867) 49.
(3) Law Rep. 5 H. L. 157.

V.-C. B. 1875 BROWNE'S CASE.

to have the *bonâ fide* question, whether we are shut out by delay from disputing our liability, argued before the Court which, under the *Companies Act*, 1862, is the Court to determine it. There has been no agreement or understanding between the parties so as to make it an act of bad faith on the part of *Browne* or his representative to appeal to the House of Lords, as the speedier mode of having the question of his liability once for all determined, after withdrawing his intermediate appeal.

Mr. *Kay*, Q.C., and Mr. *Brooksbank*, for the official liquidator:—

The dates as shewn by the affidavit of the official liquidator are sufficient to dispose of the application. The appeal from the order of November, 1871, of which notice was given within the twenty-one days limited by sect. 124 of the *Companies Act*, 1862, was deliberately abandoned; and now, after the lapse of more than three years, during which period compromises have been accepted and the liquidation managed on the footing that *Browne* was liable, and on the faith of his acquiescence in that liability, it is sought again to open the whole question on the application by a representative for an indulgence which the deceased contributory never asked or intended to ask for. In *Kay* v. *Smith* (1) the Lord Chancellor could discover no grounds for the opposition to the application; but when the applicant, having ample time for appealing against the order, has allowed the proceedings under it to go on, the Court will, in the exercise of its discretion, refuse leave to inrol, *In re Charles Laffitte & Co.* (2), especially in matters of winding-up; the whole policy of the *Companies Act*, 1862, being to discourage in the most marked way all delay in appealing.

Mr. *Fry*, in reply.

SIR JAMES BACON, V.C.:—

The limit of time provided by Cons. Ord. XXIII. r. 25, applies to all proceedings of the Court. After six months, granting or refusing an application for leave to inrol is a matter in the discretion of the Court, and the onus of shewing a case for

(1) 7 D. M. & G. 383. (2) Law Rep. 10 Ch. 316.

indulgence rests upon the parties applying for leave to inrol after the expiration of that time. By the *Companies Act*, 1862, s. 124, which must be taken in connection with that order, it is provided that appeals from any order made in a winding-up may be had in the same manner, and subject to the same conditions, in which appeals may be had from any order or decision of the same Court in matters within its ordinary jurisdiction, "subject to this restriction, that no such rehearing or appeal shall be heard unless notice of the same is given within three weeks after any order complained of has been made, in manner in which notices of appeal are ordinarily given, according to the practice of the Court appealed from, unless such time is extended by the Court of Appeal"—that is, by the Lords Justices. This clause limits the discretion of the Court, but if any doubt remained on the matter it would be directly against the policy, and opposed to the practice, of the law to permit an inrolment of the order in this case. Notice of appeal was given by Mr. *Browne* within proper time, and afterwards withdrawn, and the winding-up has proceeded on the footing, and all the arrangements under it have proceeded on the footing, that all intention on the part of *Browne* to contest his liability had been finally and deliberately abandoned. The policy of the *Winding-up Act*, which must be taken into consideration, is the realization of the assets for the purpose of paying the creditors, and any delay is of the utmost consequence, and not to be encouraged. Mr. *Browne*, by his solicitors, and not merely by his mother, had notice of every proceeding in Chambers; neither he nor his administratrix ever took any steps, and now that he is dead, his mother, whether in the hope that some compromise may be effected, or that some two or three years may elapse before the case can be heard in the House of Lords, comes forward with this application for leave to inrol. The mother's interference is purely gratuitous, and her affidavit is open to much observation. She does not say that she paid the call against her son's wish, or that he did not repay her. She does not say that she has been requested by the administratrix to make this application, and there is not a single word to shew that her interference is not purely gratuitous. There is no ground whatever for the application, and the official liquidator would have neglected his duty if he had not opposed

V.-C. B. 1875 BROWNE'S CASE.

it to the utmost. After the lapse of four years, being made with the object solely of delay, it cannot be entertained. The application is eminently unreasonable, and must be refused with costs.

Solicitors: Messrs. *Gregory, Rowcliffes, & Rawle;* Mr. *A. Pulbrook.*

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V.-C. B. 1875 *July* 6, 7.

## *In re* CORDWELL'S ESTATE. WHITE *v.* CORDWELL.

[1873 C. 174.]

*Administration — Intestacy — Wife's Equity to a Settlement — Insolvency of Husband—Right to set off a Debt, partly statute-barred, against a Share under an Intestacy.*

Where a husband, a journeyman carpenter, was in the receipt of wages not exceeding 12*s.* a week, and had to support a wife and six children, the Court settled the whole of an incoming fund, the property of the wife, but liable to the extent of the husband's interest to the claim of a creditor, upon the wife and children.

An administrator is entitled to set off against the share of one of the next of kin in the intestate's estate, the whole of a debt of which part had become barred by the *Statute of Limitations.*

FURTHER CONSIDERATION.

*Sarah Cordwell* died intestate, and on the 9th of May, 1873, administration of her estate and effects was granted to one of her cousins, named *Edward Nicholas Cordwell.*

Shortly afterwards a suit for the administration of her estate was instituted by summons by *John White* and *Mary Frances* his wife, against the administrator—the female Plaintiff being another cousin.

Inquiries having been directed by an order of the 11th of July, 1873, the Chief Clerk found the next of kin to be seven in number, of whom the female Plaintiff, the Defendant, and another cousin, named *William Thomas Cordwell,* were three.

He had also found as follows:—

The Plaintiff, *John White,* was indebted to the estate in a balance, the amount of which was in dispute, of a debt, which had been secured by a mortgage, dated the 8th of May, 1868, made by

*White* to the intestate, to secure repayment of £850 and interest at £5 per cent. He was also indebted to the estate in a sum of £45, in respect of a guarantee which had been given on his behalf by the intestate.

*White* and his wife, on the 20th of March, 1875, executed a settlement, whereby "all that one equal seventh part or share, or other the parts, share, or interest" of *Mary Frances White* in the personal estate of the intestate was settled for the benefit of her and her children.

The Defendant, the administrator, sought to vary this, contending that *White's* debt ought to be deducted from Mrs. *White's* share in the fund, and paid to him, the administrator, and only the residue settled.

*White*, who was a journeyman carpenter, and who had been injured by an accident, was in the receipt of earnings, not more on an average than 12*s.* a week, and had to support his wife and a family of six young children.

Another question arose thus: the Chief Clerk found that *William Thomas Cordwell* was indebted to the estate in a sum of £400, being the balance of principal due on a promissory note dated the 25th of December, 1864, for £500, payable to the intestate by quarterly instalments of £25 each, with interest at £5 per cent., from the 25th of December, 1865, "part of which debt and interest," the certificate stated, "is barred by the *Statute of Limitations*."

The Defendant, the administrator, contended that he was at liberty to retain and set off the whole of *William Thomas Cordwell's* debt, including that part of it which was statute-barred, against his seventh share in the intestate's estate.

Mr. *Little*, Q.C., and Mr. *Edward P. C. Hanson*, for the Plaintiff:—

The wife's equity must prevail over the right of the administrator to set off a debt of the husband: *Ex parte O'Ferrall* (1); *M'Cormick* v. *Garnett* (2).

Mr. *Frederic Thompson*, for the Defendant:—

As to the wife's equity, in the cases cited, only one moiety of

(1) 1 Glyn & J. 347. (2) 2 Sm. & Giff. 37.

V.-C. B. 1875 *In re* CORDWELL'S ESTATE. WHITE *v.* CORDWELL.

the wife's legacy was settled on her, and against the other moiety the executor was allowed to set off the husband's debt. That is all we now ask.

It is not the practice of the Court to settle the whole of the fund, unless the husband is actually insolvent: *In re Suggitt's Trusts* (1).

SIR JAMES BACON, V.C.:—

The question is one of discretion, to be exercised by the Court according to the facts of each particular case.

In this instance I think the circumstances of the husband are such as to amount to insolvency, or at least to inability to support his wife and children, within the meaning of the rule, and the whole fund must be settled.

Mr. *Thompson*, in continuation:—

Upon the other point, the right of an executor to retain a statute-barred debt against a legacy has been long established: *Courtenay* v. *Williams* (2).

There is no authority on the precise point of whether an administrator can set off a statute-barred debt against a share of an intestate's estate; but the principle is analogous, and the result must be the same.

Mr. *Kay*, Q.C., and Mr. *Millar*, for *William Thomas Cordwell*:—

We do not dispute the administrator's view in the case of a legacy. But the difference is obvious: a legatee takes by the bounty of the testator, whereas next of kin take by operation of law, under a statute.

We admit there is no authority on the point.

Mr. *Hubert Lewis*, for others of the next of kin.

SIR JAMES BACON, V.C.:—

I am not surprised that there is no authority on the point.

The duty of an administrator is to administer the estate of the intestate. In this instance part of the estate consists of this debt, which is due to the estate, though the remedy for recovering part of it may have become barred by statute. Until the debtor dis-

(1) Law Rep. 3 Ch. 215. (2) 3 Hare, 539; 15 L. J. (Ch.) 204.

charges his duty to the estate by paying the debt which he owes to it, he can have no right or title to any part of it under the statute.

A legacy no doubt is a gift arising from the bounty of the testator, but a legacy can only be paid in the course of administration; that is to say, after all the claims of creditors of the estate and all the liabilities of debtors to the estate have been satisfied.

I have not the slightest doubt that this person, being one of the next of kin of the intestate, can take no share of the estate until he has discharged his obligation to it, and paid the debt in full.

Solicitor for the Plaintiffs: Mr. *Helsham.*

Solicitors for the Defendant and *W. T. Cordwell:* Messrs. *Pritchard & Son.*

Solicitor for other next of kin: Mr. *A. Drew.*

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## *In re* GARDINER'S ESTATE. GARRATT *v.* WEEKS.

[1874 G. 42.]

*Will—Bequest to Brothers and Sisters at Twenty-one or Marriage—Brother in esse, but not born, at Death of Testatrix—Class when ascertained—After-born Brother excluded.*

Testatrix by will bequeathed residuary personal estate unto and equally between all her brothers and sisters, share and share alike. She directed that the shares of her brothers respectively should not vest in them respectively until they should respectively attain twenty-one, and that the shares of her sisters should not vest in them respectively until they should respectively attain that age or marry:—

*Held*, that the testatrix's brothers and sisters formed one class only of persons; and that a brother not born, though *en ventre sa mère* when the eldest of the brothers and sisters who attained twenty-one came of age, was excluded; although he was born before the eldest of the brothers only who attained twenty-one came of age.

FURTHER CONSIDERATION.

*Mary Deborah Gardiner*, by her will, dated the 14th of January, 1852, gave a legacy of £10, and then gave and bequeathed all her estate and effects whatsoever and wheresoever as follows:—

"Unto and equally between my father *James Thomas Gardiner*,

V.-C. B. 1875 *In re* GARDINER'S ESTATE. GARRATT *v.* WEEKS.

my mother *Ann Gardiner*, and all my brothers and sisters, share and share alike; nevertheless I direct that the shares of my said brothers respectively shall not vest in them respectively until they shall respectively attain the ages of twenty-one years; and the shares of my said sisters shall not vest in them respectively until they shall respectively attain that age or marry."

At the date of testatrix's death she had three living sisters and two brothers. One of her sisters had died an infant.

The first of her brothers and sisters who came of age was a sister who attained twenty-one in April, 1849. At that date all the five brothers and sisters living at her death were born.

Testatrix died on the 15th of January, 1852, and on the 3rd of April, 1852, testatrix's mother gave birth to another child, a son, named *Thomas Murray Gardiner*.

The first of testatrix's brothers who came of age attained twenty-one in December, 1855.

The question was whether *Thomas Murray Gardiner* was entitled to a share as one of testatrix's brothers.

Mr. *T. A. Roberts*, for the Plaintiff in the suit.

Mr. *Aldred W. Rowden*, for the Defendant, the executor, and for some of the beneficiaries under the will.

Mr. *Nalder*, for *Thomas M. Gardiner*:—

The circumstance that *Thomas M. Gardiner* was not actually born at the testatrix's death, he being at the time *en ventre sa mère*, does not, of itself, prevent his participating: *Bennett* v. *Honeywood* (1); *Baldwin* v. *Rogers* (2).

Upon the question as to the date when the class becomes ascertained, one of the latest authorities is *Gimblett* v. *Purton* (3), against which it would be in vain to contend, if the language here was similar. But here there is a direction that the shares of each brother and sister shall not vest until twenty-one or marriage, which leaves the case open to the construction adopted by Vice-Chancellor *Parker* in *Taylor* v. *Frobisher* (4), that vesting at

(1) Amb. 708; *Sugden* on Powers, 8th Ed. p. 653.
(2) 3 D. M. & G. 649–656.
(3) Law Rep. 12 Eq. 427.
(4) 5 De G. & Sm. 191.

twenty-one does not mean indefeasibly vesting, but only vesting subject to becoming divested.

Moreover, here the testatrix has in fact made two separate classes, one of her brothers, and another of her sisters; and *Thomas M. Gardiner* is admissible into the class of brothers; if not into the class of brothers and sisters taken together: *Whitbread* v. *St. John* (1).

SIR JAMES BACON, V.C.:—

This point, in my opinion, is covered by the decision in *Gimblett* v. *Purton* (2), and by a great many other authorities to which it is unnecessary particularly to refer.

Mr. *Nalder* has endeavoured to shew that there are two classes of legatees, and that a different condition of membership is attached to one of the classes than is attached to the other; but in my judgment such difference of language as occurs here does not divide the legatees into two classes.

The class of brothers and sisters of the testatrix is a single class, and, being so, immediately upon one of the class attaining twenty-one, there can be no further addition to the class; and, consequently, the child who, in this instance, was born after the date when the eldest of the brothers and sisters who attained twenty-one came of age, is excluded.

It may be observed that in the head-note to the report of *Gimblett* v. *Purton* some ambiguity may arise from the use of the word "alive;" since no child except a child "born" when the eldest attained twenty-one can be admitted into the class; and a child born after that date, although *en ventre sa mère*, and so in fact living at or before the date, must be excluded.

The costs of the child, *Thomas Murray Gardiner*, will nevertheless be allowed.

Solicitor for the Plaintiff and Defendant: Mr. *F. L. Soames*, agent for Mr. *Thomas Cooke, Wokingham.*

Solicitors for other parties: Messrs. *Collyer-Bristow, Withers, & Russell;* Messrs. *May, Sykes, & Batten.*

(1) 10 Ves. 152. (2) Law Rep. 12 Eq. 427.

V.-C. B.
1875
July 8.

## *In re* CHARLES LAFFITTE & CO., LIMITED.

### LAFFITTE'S CLAIM.

*Practice—Costs—Taxation—Third Counsel—Skilled Witness—Allowance.*

2 Ch D 276-7
278
9 Ch D 241

The junior counsel who had advised throughout the proceedings taken by a claimant against a company in liquidation, in respect of their breach of contract to purchase his business, having been called within the Bar before the hearing of the claim and after a leader had been retained:—

*Held*, on review of taxation, that having regard to the length and complication of the case and evidence, the costs of a third counsel as junior counsel at the hearing ought to be allowed.

An accountant employed as a skilled witness to give evidence in support of the claim, though entitled to a reasonable allowance for his time and expenses in preparing his evidence by an examination of the books, is not entitled upon party and party taxation to his charges for balancing and putting the books into shape for the purpose of supporting the claim.

ADJOURNED summons on behalf of *C. Laffitte*, for the purpose of obtaining a review of the taxation of costs in this matter, under which the Taxing Master had, 1, disallowed the costs of the junior's brief as third counsel engaged on behalf of *Laffitte* on the hearing in this Court of his claim for damages, under the inquiry directed by the House of Lords; and, 2, had only allowed £157 10*s.* in respect of the charges of Mr. *Kemp*, the accountant employed by and on behalf of *C. Laffitte* to give evidence as to the nature and extent of his business, which he had contracted to sell to *C. Laffitte & Co., Limited.*

In December, 1865, *Laffitte* agreed to sell his business as a banker and financial agent at *Paris* and elsewhere for £150,000 (afterwards reduced by agreement to £100,000), to a company to be formed for the purpose of purchasing and carrying on such business under the firm of *Charles Laffitte & Co., Limited.* The contract was not carried out, as the company failed and in November, 1866, was ordered to be wound up. *Laffitte* carried in a claim as a creditor under the winding-up, and after considerable litigation it was referred back to this Court by the House of Lords to ascertain what damages *Laffitte* had sustained by the breach of the contract between him and the company. The claim was heard on

several days in November, 1874; and on the 12th of December, 1874, Vice-Chancellor *Bacon* made an order allowing *Laffitte's* claim for the full amount (£90,000) with interest, and directing payment of *Laffitte's* costs.

With respect to the third counsel's brief, it appeared that Mr. *Waller* was originally employed as junior counsel for *C. Laffitte*, and advised on his behalf throughout the proceedings. Mr. *Kay*, Q.C., was retained as leader on the same side; and afterwards, but before the hearing of the case in the House of Lords, Mr. *Waller* was called within the Bar. Upon the hearing before Vice-Chancellor *Bacon*, in November, 1874, Mr. *Davey* was employed as junior counsel in addition to Mr. *Kay*, Q.C., and Mr. *Waller*, Q.C.

With respect to the second point; Mr. *Kemp's* affidavit in support of *Laffitte's* claim, made at the hearing before Vice-Chancellor *Bacon*, contained an elaborate account of the profits and losses of *Laffitte's* business. He was engaged for some time both in *London* and *Paris* in examining and arranging *Laffitte's* books preparatory to making his affidavit, and his claim against *Laffitte* for his services whilst thus engaged was £2186; his own expenses being charged at £15 15*s.* a day, and those of his clerks at £3 3*s.* and £2 2*s.* a day.

The Taxing Master had stated his reasons (in substance) as follows:—

"These objections raise two points for the consideration of the Court,

"1. Whether the costs of three counsel on the hearing of the motion ought to have been allowed to Mr. *Laffitte*.

"2. Whether a sufficient sum has been allowed in respect of his payment to Mr. *Kemp*, a witness, for giving evidence by affidavit.

"As regards the first point: Mr. *Waller* held a brief in the House of Lords, though he did not argue the case. He advised throughout the present proceedings, having advised for and settled the particulars of demand, having advised on the proper evidence and settled all the affidavits, and having gone to *Paris* to attend the examination of witnesses. Mr. *Kay* was retained as leading counsel for Mr. *Laffitte*. On the motion coming on, in addition to the briefs to Mr. *Kay* and Mr. *Waller*, a brief is given to Mr. *Davey*, who then comes into the case for the first time. The grounds on

V.-C. B. 1875 *In re* CHARLES LAFFITTE & Co., LIMITED. — LAFFITTE'S CLAIM.

which it has been sought to support the claim for allowance of the costs of this brief are, as I understand, first, that the sum in dispute is very large; and secondly, that it had become known that the Respondent, the *National Bank*, intended to appear by four counsel.

"I have not considered that there is any good reason why, if the circumstances of the case rendered the employment of three counsel proper on a motion, the expense thereof should not be allowed, though I am not aware that the propriety of such allowance has ever come before the Court.

"There being no pleadings, no question arises from the fact that Mr. *Waller* had been called within the Bar. This does not appear to me to be a case of the class which the Court had thought might warrant the expense of three counsel. I consider that to bring it within the principle of the decided cases there must be not only importance of value, but also an unusual quantity of evidence, and an unusual call on the time of counsel from the length of the hearing. It seems to me that if three counsel be allowed here the like allowance cannot be refused in any litigated case which the parties may think so important as to induce them to incur the expense. I do not consider it any reason for such allowance that the opponent may think proper to retain an unusual number of counsel." The Taxing Master proceeded to state that in his opinion it would not be right, from the fact of the parties thinking proper to conduct the litigation in an expensive manner, to depart from the ordinary practice, and make a precedent which must of necessity be applied to other suitors not in a position to bear the same expenses.

Upon the second question, as to the proper allowance to be made to a skilled witness,—

"In this Court there is no scale of allowance for witnesses. There is a scale in the Common Law Courts to which we have recourse if it be found to be applicable. Under that scale the sum which it would seem would be allowed for Mr. *Kemp's* evidence would be two guineas. The rule in this Court under which allowances for witnesses are made is the 120th Order of the 8th of May, 1845, which directs:—'Where costs are to be taxed as between party and party the Taxing Master may allow to the party entitled to receive such costs all such just and reasonable expenses

as appear to have been incurred, *inter alia*, in procuring evidence by deposition or affidavit, and the attendance of witnesses. But in allowing such costs the Taxing Master is not to allow to such party any costs which do not appear to have been necessary or proper for the attainment of justice or for defending his rights, or which appear to have been incurred through over caution, negligence, or mistake, or merely at the desire of the party.'

"Mr. *Laffitte* filed an affidavit of *Kemp*, the accountant, in which is set out in a schedule the amount of profits appearing by *Laffitte's* books to have been realized by him from the year 1859 down to the time of the sale of his business in 1865, and of the profit and loss appearing by the books to have been realized from year to year since that time, and a like account of his financial business from 1852. This affidavit was sworn on the 17th of December, 1873. For this purpose Mr. *Kemp* appears to have gone to *Paris* to examine Mr. *Laffitte's* books, and to have been engaged there, at different times between the 29th of September and the 15th of November, nineteen days. I have estimated the allowance at the rate of five guineas a day, or in round figures have allowed 100 guineas. I have also, though with hesitation, allowed the assistance of a clerk for the same period at 2½ guineas a day or fifty guineas. I have made these allowances from the best consideration I have been able to give to the claim of Mr. *Kemp* on *Laffitte*, of very much larger amount, laid before me.

"I have not to make allowance in respect of any expenses *Laffitte* may have incurred in the employment of *Kemp* as an accountant to make up or remodel or balance his banking books—but only a just and reasonable allowance for his evidence as given by affidavit. It is to be observed (the affidavit being sworn on the 17th of December, 1873) that Mr. *Kemp* states his services to have been continued up to the 22nd of May, 1875, and his clerks' services up to the 11th of June, 1874, and that he himself and one of his clerks were in *Paris* in May, 1874, which would seem to have been the time of his cross-examination, his fees for which had been already paid. I apprehend that the large sum charged in Mr. *Kemp's* account for the services of his clerks must have reference to his statement that he was engaged 'in extracting all items of profits and loss from 1852 to 1867, and translating and recording them in

V.-C. B.
1875
In re CHARLES LAFFITTE & Co., LIMITED.
LAFFITTE'S CLAIM.

supplemental books,' 'in setting up new journals and ledgers in accordance with the amendments arising from his investigation and balancing the ledger accounts, &c.,' 'in preparing supplemental books,' and the various other work of like description set out in his account. But it seems to me that if Mr. *Laffitte's* books were not in such a condition as to enable a skilled accountant to state the balances appearing therein without making new books as described by Mr. *Kemp*, and that Mr. *Laffitte*, instead of completing the work by his own clerks, thought it better to employ an English accountant, such work must be considered as work rendered by Mr. *Kemp* as an accountant and not as a witness. After careful examination I am unable to see my way to make a larger allowance to Mr. *Laffitte* under the head of just and reasonable expenses of Mr. *Kemp's* evidence by affidavit."

Mr. *Kay*, Q.C., and Mr. *Davey*, Q.C., in support of the summons to review:—

1. We are entitled to the allowance of the costs of the third counsel employed in this case after the original junior (Mr. *Waller*), who was engaged in and advised upon the proceedings from the outset, was called within the Bar. The case was one of peculiar magnitude and difficulty, the brief being contained in a book of 350 printed pages; the amount claimed was very large; and the employment of four counsel by the official liquidator corroborates our position that the case was so complicated and difficult as to justify the appearance of three counsel on behalf of the applicant. The rule (until the recent announcement by the Lords Justices on the 6th of July, 1875) has been to allow in heavy cases a third counsel where the second counsel has taken silk before the hearing: *North-Eastern Railway Company* v. *Jackson* (1); *Wentworth* v. *Lloyd* (2); *Pearce* v. *Lindsay* (3); *Cousens* v. *Cousens* (4). All that *Betts* v. *Cleaver* (5), which may be referred to on the other side, decides is, that there must (as was the case here) have been an actual retainer of the leader before the second counsel was called within the Bar.

(1) 22 W. R. 629. WN (1874) 113. (3) 1 D. F. & J. 573.
(2) Law Rep. 2 Eq. 607. (4) Law Rep. 7 Ch. 48.
(5) Law Rep. 7 Ch. 513.

2. The allowance to Mr. *Kemp* is too small for a skilled witness, having regard to the time and trouble expended by him, in order to prepare the evidence and place before the Court the actual nature of the business which *Laffitte* proposed to sell to the company. It was necessary for *Kemp* to make himself acquainted, not only with the balances, but with the details of which those balances furnished the result. The books, which were in the French language, and the accounts in French currency, had to be translated. We submit that, at all events, seven guineas a day, the amount determined upon in *Smith* v. *Buller* (1), ought to be allowed, and also hotel expenses while in *Paris*, in addition to that allowance.

Mr. *Jackson*, Q.C., and Mr. *Hastings*, Q.C., for the official liquidator, were heard upon the first point only:—

As a general rule, on a taxation as between party and party, very special circumstances are necessary to justify the allowance of a third counsel: *Morgan* and *Davey* on Costs (2); *Attorney-General* v. *Munro* (3). There are no such special circumstances here, and the mere fact that the counsel who has advised upon the case—there were no pleadings here to draw—has been called within the Bar before the hearing, or the length of the proceedings, is not sufficient for the allowance of a third counsel: *Merchants' Banking Company* v. *Maud* (4).

SIR JAMES BACON, V.C.:—

I do not understand that the Lords Justices, upon that recent occasion to which I have been referred, laid down any rule. They only decided that the fact that one of the junior counsel being called within the Bar did not of necessity justify the employment of a third counsel. That is all I understand their Lordships to have decided; and, if I may respectfully say so, it was very usefully said, and I would humbly concur in everything that was said on that occasion. It is not the rule that, because the junior counsel concerned in the case becomes a leader, therefore his place is to be supplied by an additional counsel. I proceed upon no such ground. But having a sufficient recollection

(1) Law Rep. 19 Eq. 473.
(2) Page 352.
(3) 1 Mac. & G. 213.
(4) *Ante*, p. 652.

V.-C. B. 1875

*In re* CHARLES LAFFITTE & Co., LIMITED.

LAFFITTE'S CLAIM.

of this case, and of the length of time it occupied in argument before me, I cannot concur with what has been urged, as if the new evidence was the only thing to be considered. I think that the employment of a third counsel was perfectly justifiable, having regard to the circumstances of this case. I think that, although Mr. *Waller* has ceased to be a junior, it was expedient and just that some person should take his place as junior, and that the assistance of the third counsel in the case was, if not necessary, at least very useful to the Court in the discussion. And without disturbing any rule it appears to me, on consideration of the authorities that have been referred to, in which the employment of a third counsel was considered to be necessary, not only as to pleadings, of which there are none in this case, but with regard to the magnitude, importance, and detailed nature of the case, that it was expedient, at least, that a third counsel should be engaged. I entirely agree with the Taxing Master that the large amount at stake and the fact that the opponents had four counsel were no reasons; but I do consider, and in this respect I differ from the Taxing Master, that the length of the proceedings, the length of the evidence, the unusual call upon the time and attention of the counsel, all of whose attendance in Court cannot at all times be expected or perhaps required—I think those are things which justified Mr. *Laffitte* in adding, upon the hearing of the summons which was litigated before me, a third counsel to the two he had before retained. I am therefore unable to concur with the Master in the conclusions that he draws; and although I agree entirely with him upon the principle he lays down, I think that the addition which he specifies ought to be made, and that his certificate ought to be varied in that respect.

Upon the other point, what the Taxing Master has done is, in my opinion, exactly what ought to have been done in this case. That there is no rule in this Court relating to the allowance for skilled witnesses is noticed by the Master. What is the case that I have to deal with in that respect? It was incumbent upon Mr. *Laffitte* to shew—the onus in that respect was upon him to shew—that he had sustained a certain loss. The means of shewing that could only be derived from the business he had carried on. If his books had been properly kept, it would not

have been necessary, as far as I can see, to have called in any evidence in addition to his own, and to the production of his books—not that the production of his books would have been in itself evidence, but they would have been a corroboration, and would have enabled him, upon cross-examination or otherwise, to justify the statement he had previously made. If he had not kept his books properly, which seems to have been the case, it was, as I conceive, incumbent upon him, at his own expense, if expense was necessary, by his own exertions, if he could do it without any expense, to put his books and accounts into that plain, legible shape that they would justify the charge he made. It seems to have been thought necessary, and, for anything I know, it was necessary, that the case should not rest upon his single testimony, as it might have done; and in order to support his testimony, therefore, he calls in the assistance of Mr. *Kemp*, an accountant. But Mr. *Kemp's* evidence could only be to corroborate that which Mr. *Laffitte* stated, or might have stated for himself. I find that Mr. *Kemp* was employed in a totally different office: taking up the confused or imperfect books of Mr. *Laffitte*. Mr. *Kemp*, with his skill as an accountant, recasts those books, employs himself and various clerks in making a new set of books, in order that from those books he may give the evidence which he afterwards gives in the case. In my opinion that was wholly unnecessary. It was perhaps necessary, at least not unreasonable, that Mr. *Kemp* should be called in by Mr. *Laffitte* to vouch the statement which he made as to the amount of his profits. In that employment Mr. *Kemp* ought to have had no other source to resort to but the books of Mr. *Laffitte*, to examine them and have them verified, and to state the result which was to be drawn from those books. Instead of that, he himself states in the paper with which the Master has been furnished, that he was employed "in extracting all items of profit and loss from 1852 to 1867, and translating and recording them in supplemental books, in setting up new journals and ledgers, in accordance with the amendments arising from his investigation, and balancing the ledger accounts, &c., in preparing supplemental books," and so on. Now upon that the Master says: "Such work must be considered as work rendered by Mr. *Kemp* as an accountant, and not as a witness."

V.-C. B.
1875
*In re* CHARLES LAFFITTE & Co., LIMITED.
LAFFITTE'S CLAIM.

The Master has acted upon his experience and in the exercise of his discretion; and dealing with this skilled witness, he makes to him the allowance which he thought it was right to make, allowing him five guineas a day for the days on which he was employed in that necessary and proper work, and to his clerks in proportion for the same thing. Then it is said that if I decide that five guineas is enough, or rather that the Master is right, and allow five guineas a day, I act somewhat at variance with the decision in *Smith* v. *Buller* (1). I do not think that I do so, and I do not intend to do so at all. In that case Vice-Chancellor *Malins* was of opinion that to enable a skilled witness to give such evidence as was necessary on the subject of a particular mechanical invention, it was necessary he should make himself acquainted with certain previous proceedings. In that respect the Vice-Chancellor thought seven guineas a day a reasonable allowance. But this does not, in my opinion, resemble that case in any degree. There was no occasion for any scientific witnesses, except so far as arithmetic is a science. The Master was aware of what the rule is at common law; he was also aware that there is no such rule in the Court; and having the whole matter before him, and having the very long experience which he has had in these matters, I do not think myself at liberty to interfere with that. It is no matter of principle with which the Court ought to interfere; but a mere matter of detail, a matter upon which the Master was perfectly competent to exercise his judgment as he has been in the habit heretofore of doing. In my opinion, the Master's allowance for the briefs ought now to be varied, and in other respects I think the Master is perfectly right.

No order as to costs.

Solicitors: Messrs. *Stevens, Wilkinson, & Harries;* Messrs. *Combe & Wainwright.*

(1) Law Rep. 19 Eq. 473.

## SHEPHEARD *v.* WALKER.

V.-C. B.
1875
*July* 8, 9.

[1873 S. 82.]

*Specific Performance—Delay—Lessor and Lessee.*

At the expiration in July, 1857, of a lease under which by assignment he was in possession of property, *B.* signed an agreement to accept from *A.* a new lease for thirty-one years, at the same rent as was reserved by the old lease, and payment of £600 on the day fixed for completion (1st August, 1857), with interest if the lease should not be completed on the day fixed. A draft lease was sent to *B.* for his approval but was not returned, and no steps were taken by *A.* to press for completion. *B.* remained in possession and paid rent, but no payment of the £600 or interest was ever made or demanded. In 1871 *A.* died. On bill by her legal personal representative:—

*Held*, that as *B.*'s possession and payment of rent must be referred to the new agreement, and not to a holding over after the expiration of the former lease, the lapse of time did not operate as a bar to specific performance, which was accordingly decreed, with interest on the £600 from the 1st of August, 1857.

In July, 1857, Miss *Read* agreed, in consideration of £600, to grant to the Defendants, Messrs. *Walker*, a lease of the *Coventry Cross* public-house, at *Bromley* (then in the occupation of the Defendants or their undertenants, under a lease of the 15th of August, 1826, granted by Miss *Read's* father and predecessor in title to Messrs. *Taylor, Walker, & Taylor*, and vested in the Defendants by assignment), for the term of thirty-one years, from the 24th of June, 1857, at the yearly rent of £100 payable quarterly. And it was agreed that the said sum of £600 should be paid by the Defendants to Miss *Read* on the 1st of August, 1857, on which day the lease was to be completed and a counterpart to be executed by the Defendants, and if from any cause whatsoever the lease should not be completed on that day and the sum of £600 paid, the Defendants were to pay interest on the same at 5 per cent. from that day till completion. It was also agreed that the lease should contain similar covenants and provisoes to those contained in the lease of the 15th of August, 1826. The memorandum of agreement containing these terms was signed by one *Blackie*, a clerk of the Defendants, as agent on their behalf.

Miss *Read* instructed her solicitor to prepare a draft lease in

V.-C. B. 1875 SHEPHEARD v. WALKER.

pursuance of the agreement, and on the 14th of August, 1857, a fair copy of the draft was delivered to the Defendants for their approval; but they had never returned the draft to Miss *Read*, or to any one on her behalf, and, as the bill alleged, from their refusing or neglecting to return the draft and to pay the £600 premium, the lease had never been executed. At the date of the agreement, and ever since, the premises were and had been in the possession and occupation of the Defendants, who had from time to time made payments to Miss *Read* in respect of the yearly rent of £100, and, as the bill averred, for interest upon the said sum of £600; but this averment was not borne out by the receipts produced in evidence. The last of such payments was made on the 20th of March, 1871, £98 6*s.* 8*d.*, being the amount (less income tax) of one year's rent which accrued due under the agreement on the 25th of March, 1866.

Miss *Read* died on the 6th of December, 1871, and the Plaintiff, as her surviving executor, was her legal personal representative.

Shortly before her death the license for the public-house comprised in the demise was forfeited, owing, as the bill alleged, to the wilful misconduct of an undertenant of the Defendants.

The whole of the £600, with a large arrear of interest thereon, and the rent from the 25th of March, 1866, up to the death of Miss *Read*, was now claimed by the Plaintiff, as her legal personal representative, and the bill was filed to obtain specific performance of the agreement and damages for non-fulfilment thereof, and in particular damages in respect of the forfeiture and loss of the license of the public-house.

The Defendants by their answer stated that although the memorandum of agreement of July, 1857, was signed by their clerk, and the draft of a proposed lease sent to them, the draft was never approved by them, and the whole matter then dropped and no further action was ever taken therein. They continued to hold the premises at the old rent of £100 per annum, as paid under the expired lease, but for no definite term, and without the payment of any premium. No money was ever paid by way of premium or for interest on the premium, nor was any application ever made to them by or on behalf of Miss *Read* for premium or interest, or for a return of the draft lease by or on behalf of Miss *Read*, down to

the day of her death. Under the circumstances, the Defendants submitted that the memorandum and negotiations for a lease for thirty-one years in consideration of a premium were waived and abandoned by the acts and conduct of the parties, and that the claim now set up by the bill to compel them to take a lease and pay £1500, or thereabouts, for the same, was unjustifiable; that Miss *Read*, if she desired to compel the Plaintiffs to pay the suggested premium and take a lease, was bound to have demanded the premium and tendered the lease within a reasonable time, and that she would have been debarred by her own conduct and laches from enforcing any such agreement had she attempted to do so, which she never did. They submitted that they were not liable to pay the £1552 16*s.* 6*d.* alleged to be due under the alleged agreement, or any other sum except the yearly rent of £100, which they had always been, and now were ready and willing to pay to the person legally entitled, so long as their occupation of the premises continued.

From the evidence of the Plaintiff, who had been Miss *Read's* solicitor, it appeared that he had on several occasions called her attention to Messrs. *Walker*, and that Miss *Read* told him that she did not wish the Defendants to be pressed; that she was not in need of the premium of £600, and that she could not get as much as 5 per cent. interest for it elsewhere, and she considered it safe. Miss *Read* was also stated to have been possessed of very considerable sums of money in the funds and a large quantity of house property, especially in *Stamford Street*. She was in the habit of allowing the dividends and rents thereof to accumulate for several years before receiving the same, and at the time of her death four and a half years' dividends at least remained unreceived by her upon her property in the funds, and considerable arrears of rents were due by her various tenants and lessees.

Mr. *Jackson*, Q.C., and Mr. *Wells*, for the Plaintiff:—

The Defendants, who have continued in possession of property since August, 1857, under an agreement for a lease, subject to a premium of £600, with interest until execution of the lease, their possession being referable to no other agreement, decline to pay the premium, which was an essential part of the consideration

V.-C. B. 1875 SHEPHEARD v. WALKER.

for the lease, because, forsooth, they have been in possession so long, and the demand is said to be stale. But although as a general rule delay and laches on the part of the Plaintiff are a good defence to a suit for specific performance, the principle does not apply, and this defence cannot be sustained, where the relation of the parties has been in no degree altered by the delay, and the Defendants have been in possession under and enjoyed the benefits of the agreement; while the Plaintiff and his testatrix have not been sleeping upon their rights, but simply relying on their equitable rights, without thinking it necessary to have their legal rights perfected. In such a case there has been such part performance of the agreement as to render the defence of laches untenable and inequitable: *Clarke* v. *Moore* (1); *Sharp* v. *Milligan* (2).

Mr. *E. Beaumont*, for *Chabot*, the heir-at-law of Miss *Read*.

Mr. *Kay*, Q.C., and Mr. *F. V. Hawkins*, for the Defendants:—

The agreement of which specific performance is sought was entered into eighteen years ago and immediately abandoned, and there has been no part performance by the Defendants sufficient to get rid of the effect of the delay and waiver. We have remained in possession, not under the agreement of July, 1857, but as tenants at will holding over after the expiration of the old lease, and we have simply paid the old rent thereby reserved. In order to amount to part performance the conduct of the Defendants must be unequivocally referable to the agreement: *Morphett* v. *Jones* (3); *Nunn* v. *Fabian* (4). The mere fact of continuance in possession after the expiration of the old lease does not amount to part performance of an agreement to accept a new lease: *Wills* v. *Stradling* (5). It was of the essence of the agreement that interest should be paid on the premium if the premium remained unpaid, but for eighteen years the Defendants have been allowed to remain on the footing of the old lease without payment of the premium or any interest thereon, and

(1) 1 J. & Lat. 723.
(2) 22 Beav. 606.
(3) 1 Sw. 172.
(4) Law Rep. 1 Ch. 35.
(5) 3 Ves. 378.

without any claim for it having been either made or recognised; and upon the evidence afforded by the receipts and the conduct of the parties the agreement was clearly treated as abandoned, at all events *quâ* payment of premium. A Plaintiff cannot call upon a Court of Equity for a specific performance unless he has shewn himself ready, desirous, prompt, and eager: *Milward* v. *Earl Thanet* (1); *Eads* v. *Williams* (2); and the delay of eighteen years is fatal to the Plaintiff's claim: *Lehmann* v. *McArthur* (3); *Southcomb* v. *Bishop of Exeter* (4); unless in a case where nothing remains to be done but to clothe the equitable estate with a legal title: *Crofton* v. *Ormsby* (5). In any case, even if the rest of the contract could be enforced, payment of the £600 premium and interest is barred by the *Statute of Limitations*.

Mr. *Jackson*, in reply.

Sir James Bacon, V.C.:—

The case as stated upon the bill is as plain a case as possible. A lease in which neither the testatrix nor the Defendants were lessor or lessees had been in existence, and is recited in the agreement entered into between the testatrix and the Defendants. That agreement is for a lease upon terms clearly specified, and it is admitted by the Defendants in unqualified terms that that agreement was signed by their agent on their behalf. The notion that the possession which has been continued by the Defendants is to be referred to the old lease, or to a tenancy at will after the old lease had expired, is, in my opinion, wholly without foundation, and is contradicted by the plain facts of the case, and is not even asserted by the Defendants in their answer. [His Honour, after stating the agreement, continued:—] As I have said, nothing can be more explicit than the terms of that agreement, nothing more distinct than that any possession to be taken or retained by the Defendants after that can be referred only to that agreement. The cases which have been referred to were cases in which it was endeavoured to supply the deficiency occasioned by

(1) 5 Ves. 720, n.
(2) 4 D. M. & G. 674.
(3) Law Rep. 3 Ch. 496.
(4) 6 Hare, 213.
(5) 2 Sch. & Lef. 583, 603.

V.-C. B. 1875 SHEPHEARD v. WALKER.

the strict interpretation of the statute—the deficiency of a written contract. But the contract being admitted, the difficulty that arose in *Morphett* v. *Jones* (1) was at once got over.

It only remains to consider the terms on which the tenancy has been continued. It is said that the rent is just the same as it was under the old lease. That may be, but it is the only rent which Miss *Read* claimed to be entitled to under the agreement, and that the Defendants say in their answers they have paid to her from the time mentioned in the answer up to the date there specified. There is no doubt, upon the admission in their own answer, that from the time of the execution of the agreement by their agent on their behalf they did pay the said rent (that is the rent mentioned in the agreement) to Miss *Read* in her lifetime. What becomes then of the objection that this may be referred to something else; that the possession might have been a continuance as tenants from year to year? They admit they have paid the very rent which by the agreement they had stipulated to pay.

It is said that the Plaintiff is deprived of the right which he otherwise possessed by reason of laches. Now the laches consists in this. The testatrix may be said to have been an eccentric person, but with that I have nothing to do, and I do not regard it in considering the case. But the defence set up by the answer is, after admitting the agreement, after admitting that the draft of the proposed lease was sent by the solicitor of Miss *Read*—"but the draft was never approved of by us, and the whole matter then dropped," and—adopting the favourite Americanism—"no further action was ever taken herein." Then comes, not the assertion of a fact, but an expression of belief. "Under the circumstances aforesaid we submit and humbly insist that the aforesaid memorandum and negotiations for a lease for thirty-one years in consideration of a premium were waived and abandoned by the acts and conduct of the parties."

There is not a particle of evidence that the agreement between these parties was waived and abandoned. To do the Defendants justice, they have carefully, at all events effectually, avoided pledging their oaths to any such statement. The evidence on the other side is complete and perfect that it never was abandoned. Under

(1) 1 Sw. 172.

these circumstances I am asked to pause before making a decree for the specific performance of this agreement, against which there is not a particle of defence, not a single fact proved, not a single statement or suggestion made to which I can in the slightest degree attend. Something was said about the *Statute of Limitations*, but it has no more to do with the case than many other of the topics to be read in the answer. The stipulation in the agreement is that when the lease shall be completed the £600 shall be paid. The lease has never been completed, and no statute exists to bar the claim. In my opinion a plainer case never was presented to the Court, and the Plaintiff is entitled to the decree he asks for, as the representative of Miss *Read*, for specific performance of this agreement, and to have the £600 paid as part of the consideration. There can be no inquiry into title, for that is prevented by the agreement. The lease to be settled in Chambers if the parties differ.

Mr. *Kay*:—Your Honour does not mean to give interest on this money.

The VICE-CHANCELLOR:—Indeed I do.

Mr. *Kay*:—Not for eighteen years?

The VICE-CHANCELLOR:—Yes; because you have so stipulated in plain terms. You have contracted that you will pay interest until the treaty shall be completed, and it is nobody's fault but the Defendants' that it has not been completed.

Solicitors: Messrs. *Shepheard & Sons;* Messrs. *Gellatly, Son, & Warton.*

V.-C. B.
1875
July 13.

## SMITH *v.* ILIFFE.

[1874 S. 313.]

*Ward of Court—Settlement of Personal Estate—Limitation on Death of Husband and in default of Children to Next of Kin of surviving Wife—Rectification by giving the Property to Wife absolutely.*

By a marriage settlement executed in pursuance of articles made under the order of the Court on the marriage of a lady, an infant and a ward of Court, personalty of the wife was limited on death of the husband and in default of children, both which events happened, to the wife, as she should by will appoint, and in default to her next of kin.

Upon her uncontradicted evidence that this was not in accordance with her intention:—

*Held*, that she was entitled to have the settlement rectified by limiting the property, in the events which had happened, to herself, her executors and administrators, absolutely; and declaration to that effect ordered to be indorsed on the settlement.

MOTION for decree.

By articles dated the 10th of December, 1833, and made prior to the marriage of *Elizabeth Harrold*, a minor and ward of Court, with *William Palmer*, in pursuance of an order of the Court, dated the 3rd of December, 1833, certain personal property of Miss *Harrold* was covenanted to be settled upon trusts therein mentioned; and it was by the articles declared that if there should be no child of the marriage, then, after the decease of the survivor of *William Palmer* and *Elizabeth Harrold*, the trustees should be possessed of the trust fund and the income thereof upon such trusts as *Elizabeth Harrold*, whether covert or sole, should by will appoint, and in default of such appointment for the next of kin of *Elizabeth Harrold*.

The marriage took place on the 12th of December, 1833.

On the 9th of December, 1834, *Elizabeth Harrold* attained twenty-one.

By the marriage settlement, which was dated the 4th of February, 1836, and made in conformity with the articles, and in pursuance of another order of Court, dated the 30th of June, 1835, the above personalty was settled upon the trusts therein mentioned; and the settlement continued:—

"In case there shall be no child of the said *William Palmer* by

the said *Elizabeth Harrold* who under the trusts hereinbefore declared shall attain a vested interest in the said sum, then in such case the said trustees shall, after the decease of the survivor of them, the said *W. Palmer* and *Elizabeth Harrold*, stand and be possessed of and interested in the said sum, and the dividends or annual produce thereof, upon and for such trusts, intents, and purposes as the said *Elizabeth Harrold*, whether covert or sole, shall by her last will and testament in writing, or by any codicil or codicils thereto to be signed and published by her in the presence of two or more credible witnesses, direct or appoint, and in default of such appointment, upon trust for all and every such person or persons as at the decease of the survivor of them, the said *W. Palmer* and *Elizabeth Harrold* his wife, shall be the next of kin of her the said *Elizabeth Harrold*."

On the 14th of October, 1868, *William Palmer* died. There never was any issue of the marriage.

On the 23rd of April, 1871, *Elizabeth Palmer*, the widow, married the Rev. *John Henry Smith*; and on the 20th of November, 1874, she filed this bill against *John Iliffe*, the surviving trustee of the settlement, and her husband, *J. H. Smith*, praying for a declaration that she was entitled to have the articles and settlement rectified in such manner and form as that, in the events which had happened, the funds now subject to the settlement might be held by the Defendant, *John Iliffe*, in trust for the Plaintiff, her executors, administrators, and assigns, absolutely, and as part of her separate estate.

Mrs. *Smith*, by her affidavit in support of the bill, said that the terms of the settlement were arranged by her mother and her advisers without reference to herself; that she was then a girl under twenty-one, but that she never understood that she was to be deprived of the control of her own property in the event of her becoming a widow and childless. She also said that as far as she was aware she had no near relations, and she did not know who was her next of kin.

Mr. *Kay*, Q.C., and Mr. *Warmington*, for the Plaintiff:—

The proper frame of a settlement by the Court with regard

V.-C. B. 1875 SMITH v. ILIFFE.

to this particular limitation is given in *Carter* v. *Taggart* (1); *Seton* (2).

As to the power of the Court to rectify the settlement, the authorities are, *Hobson* v. *Ferraby* (3); *Wolterbeek* v. *Barrow* (4); *Harbidge* v. *Wogan* (5); *Torre* v. *Torre* (6).

In *In re Best's Settlement Trusts* (7) it was held that by the "personal representatives" of the wife in a limitation of this kind, are meant, not her next of kin, but her executors and administrators.

Mr. *Townsend*, for the surviving trustee of the settlement.

Mr. *Field*, for the second husband.

SIR JAMES BACON, V.C.:—

The last case which has been cited furnishes at least an intelligible and satisfactory ground on which matters of this kind may be disposed of. In *In re Best's Settlement Trusts* (8) Vice-Chancellor *Hall* observes that nothing can be more improbable than that a lady, in making a settlement of her own property, should intend to put it beyond her own control in the events of the husband dying and there being no child of the marriage, and thus deprive herself of the power of making any provision on the occasion of a second marriage.

These observations have a direct bearing on the present case; and authority is not wanting, if it were needed, to shew that the Court has power to act in the way which is prayed by this bill.

The case before the late Master of the Rolls of *Wolterbeek* v. *Barrow* (9), though it proceeded on facts which are not present here, is an authority as to the jurisdiction of the Court.

In the present case the wife states positively that it was not her intention that she should be deprived of the control of her property in the events which have happened; and against that statement there is not a particle of evidence. Such a state of things

(1) 5 De G. & Sm. 49; 1 D. M. & G. 286.
(2) Page 666.
(3) 2 Coll. 412.
(4) 23 Beav. 423. 2 Jur. N.S. 804
(5) 5 Hare, 258.
(6) 1 Sm. & Giff. 518.
(7) Law Rep. 18 Eq. 686, 691.
(8) Ibid. 686, 692.
(9) 23 Beav. 423. 2 Jur. N.S. 804

as this must, according to the practice of the Court, have great weight; and there is abundant ground for holding that the Plaintiff is entitled to have the settlement rectified in such a way as that, in the events which have happened, the property may be hers absolutely.

There will be a declaration in the terms of the prayer of the bill, and it will be sufficient that that declaration be indorsed on the settlement.

The costs of all parties, as between solicitor and client, will come out of the fund.

Solicitors: Messrs. *Field, Roscoe, & Co.*; Messrs. *Iliffe, Russell, & Iliffe.*

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## CANNON *v.* TRASK.

[1875 C. 242.]

*Injunction—Powers of Directors—Annual General Meeting—Voting Powers of Shareholders.*

Although the Court will not interfere with the powers and duties of directors in their management of the internal affairs of a company, directors will be restrained from fixing a particular date for holding the annual general meeting of the company for the purpose of preventing shareholders from exercising their voting powers.

THIS was a motion for an injunction to restrain the Defendants, the chairman and directors of *Elworthy Brothers & Co., Limited*, from holding the annual general meeting of the Defendant company on the 3rd of August, 1875, and from summoning any meeting of the Defendant company on or before the 13th of August, 1875.

The company was formed in March, 1866, for the purpose of purchasing and extending the business of Messrs. *William* and *Henry Elworthy*, woollen manufacturers, of *Wellington, Somerset*, with a nominal capital of £200,000, divided into 10,000 £20 shares, the first issue consisting of 5000 shares, of which 2500 were to be issued to the public. Messrs. *Elworthy* agreed to act as managers of the company for a period of ten years from the 1st of March,

V.-C. B. 1875

CANNON v. TRASK.

1866, at a salary of £500 a year each, with an increase contingent upon the amount of dividend declared.

Messrs. *Elworthy* continued to act as managers of the company, but recently, and especially since August, 1874, differences had arisen between themselves and the Defendants, the other directors, including the Defendant *Trask*, the chairman, with regard to the management of the company, from which, as it was alleged, the Defendant directors were endeavouring to exclude Messrs. *Elworthy*. Under these circumstances, the company became divided into two rival camps, one represented by Messrs. *Elworthy* and their friends, including the Plaintiffs, the other by the Defendants the directors and chairman. But although they held a majority of the shares, Messrs. *Elworthy* were not, in consequence of the mode in which the shares were distributed, able to exercise a voting power proportioned to the shares held by themselves and their adherents in the company, nor, being in a minority on the board, successfully to oppose the action of the Defendants.

In the course of the contest the practice of buying up and distributing shares for the purpose of obtaining an increase of voting power and strengthening their interest, which was alleged to have been commenced by the directors, had been largely resorted to on both sides during the present year. In May, 1875, Messrs. *Elworthy* executed transfers of a large number of shares to nominees. Again, on the 30th of June, 1875, the transfers of 447 shares to various nominees of the Defendants were registered, and in the course of the following month transfers of 935 shares were made to nominees of the Plaintiffs and the friends of *William* and *Henry Elworthy*. In consequence of these transfers the Plaintiffs' party stood on the 13th of July the registered holders of 3068 shares, representing 1905 votes—a majority of votes and a majority of the shares in the company; but from the transfers of several of these shares not having been approved and registered until the 13th of July, the Plaintiffs would not, having regard to Article 65, command a majority of votes at any meeting held before the 13th of August, 1875.

On the 19th of July a resolution was passed by the board of directors, and notice was sent out to the shareholders convening the annual general meeting for the 3rd of August, without waiting

for the preparation and sending out of the balance-sheet and completion of the audit. The bill charged:—In fixing the annual meeting at the unusually early date of the 3rd of August, the directors were actuated by the improper motive of preventing *William* and *Henry Elworthy* and their friends from exercising the full voting power which they would possess if the meeting were held, as had always heretofore been the case, on the third or fourth Monday in August, and there was no reason why the meeting should be summoned for so early a date except that of securing to the Defendants a majority of votes with the object of furthering the views of themselves and their friends. Under these circumstances the bill was filed by the Plaintiffs, the registered holders of 397 shares (on behalf of themselves and all other the shareholders other than the Defendants), with the consent and approval of registered holders of 3065 shares entitled to 1905 votes (assuming the meeting to be held at the usual time), for the purpose of restraining the holding of the annual general meeting on the 3rd of August, and from summoning any meeting on or before the 13th of August.

The bill also sought to restrain the directors from issuing preference shares, and from doing certain other acts, but as the argument and the decision were confined to the question of the validity of the course taken by the directors in summoning the meeting for the 3rd of August, 1875, any detailed statement of the other points raised by the bill is unnecessary.

The clauses of the articles of association material for this report are the following:—

By Article 5 it was provided that the company might in general meeting from time to time, by special resolution, alter and make new provisions instead of or in addition to any regulations of the company.

"6. Shares shall from time to time be issued by the directors, either as one class or as several classes, at such times and in such manner as the board shall think fit. The board shall also have power to attach to the shares comprised in the several classes any special priority or position with reference to preferential, guaranteed, fixed, fluctuating, redeemable or other dividends or interest, or any other special priority, condition, or restriction."

V.-C. B. 1875 CANNON v. TRASK.

"21. Subject to the restrictions of these presents, any member may sell or transfer all or any of his shares by authority in writing in the form hereinafter prescribed, or to the like effect."

"27. No share shall be transferred until all calls upon such share be fully paid up. The company may decline to register any transfer of shares made by a member who is indebted to them, or if the directors shall be of opinion that the transferee is an irresponsible person, but such last-mentioned ground of objection shall not apply after the full amount of the shares transferred shall have been paid up."

"42. With the sanction of a special resolution of the company previously given in general meeting, the directors may increase its capital by the issue of new shares, such aggregate increase to be of such amount and to be divided into shares of such respective amounts as the company in general meeting shall direct, or if no direction be given, as the directors think expedient, whether the whole of the shares shall have been fully paid up, and whether the whole of the shares then for the time being issuable shall have been issued or not."

"43. With the sanction of a special resolution, the directors may attach to such or any of such new shares any preference or guaranteed dividend or profits, or any preference or priority as regarded the capital or the dividends or profits, or both, over the shares in the then existing capital, or such other special rights privileges, priorities, or advantages as they think fit."

"Meetings.

"46. The first general meeting shall be held at such time, not being more than twelve months after the registration of the company, and at such places as the directors may determine.

"47. Subsequent general meetings shall be held at such time and place (provided the same be held once at least every year) as may be prescribed by the company in general meeting, and if no other time or place be prescribed, a general meeting shall be held yearly in the month of August in every year, or on such day and at such hour and place as shall from time to time be determined by the directors."

"49. The directors may whenever they think fit, and they shall upon a requisition made in writing and signed by not less than

one-fifth in number of the members in the company, or by any number of members holding in the aggregate not less than one-fifth of the nominal capital of the company, convene an extraordinary general meeting.

"50. Any requisition so made by the members shall express the object of the meeting proposed to be called, and shall be left at the office of the company.

"51. Upon the receipt of such requisition, the directors shall forthwith proceed to convene an extraordinary general meeting; and if they neglect to do so for twenty-one days from the time of requisition being so left, the requisitionists, or any other members amounting to the required number or value, may themselves convene the meeting and give the necessary notices for the purpose."

52–53. Seven days' notice at least, specifying the place, day, and hour of meeting, and (in case of special business) the general matters of such business, to be sent to every member and signed by the secretary, except in the case of a meeting convened by members.

With respect to the votes of members, it was provided:—

"65. Every member who shall have been duly registered for one month previous to meeting shall be entitled to vote at such meeting, and shall have for every share held by him up to twenty, one vote; for every additional five shares held by him beyond the first twenty up to 100, one further vote; and for every additional ten shares held by him beyond the first 100, one further vote.

"66. The chairman of every meeting shall have a casting vote in addition to the vote to which he shall be entitled as a member."

"69. No member shall be entitled to attend or vote at any meeting while any calls or interest due from him, alone or jointly with any person or persons, are or is in arrear.

"70. Votes may be given either personally or by proxy, but every proxy shall be appointed in writing under the hand of the appointer, if a corporation under their common seal.

"71. No person shall be appointed a proxy who is not a member and entitled to vote. The instrument appointing a proxy shall be deposited at the office at least forty-eight hours before the time fixed for holding the meeting at which he proposes to vote, and

V.-C. B. 1875

CANNON v. TRASK.

no instrument appointing a proxy shall be valid after the expiration of one calendar month from the date of its execution."

Mr. *Kay*, Q.C., and Mr. *F. Thompson*, in support of the motion :—

Although the Court will not in general interfere in the internal management of the affairs of a company, directors will be restrained from an inequitable use of their legal powers for the purpose of controlling the free legitimate action of the shareholders: *Fraser* v. *Whalley* (1).

This is no mere question of internal management. It is not denied by the Defendants that they have appointed the annual meeting for the 3rd of August, a period much earlier than usual, for the purpose of defeating the legitimately created votes of the Plaintiffs and their nominees, which represent the majority of shares and the largest number of votes, but do not become available until the 13th of August for voting purposes. The Plaintiffs, therefore, are entitled to restrain the Defendants from the exercise of their powers in such a way as to deprive the Plaintiffs of their voice in the affairs of the company.

Mr. *Hastings*, Q.C., and Mr. *E. Cutler*, for the Defendants, the chairman and directors other than *William* and *Henry Elworthy* :—

The Court will not interfere between members of a company for the purpose of enforcing duties arising out of matters properly the subject of internal regulation: *Lindley* on Partnership (2). It will not compel shareholders, to whom the right of removing these directors has been given by the deed, to justify the grounds on which their discretion has been exercised: *Inderwick* v. *Snell* (3); and in the case of directors there is no jurisdiction to take the management of the company out of their hands by compelling them to summon, or restraining them from holding, a general meeting for any purpose connected with the management of the company: *MacDougall* v. *Gardiner* (4), unless it can be shewn that such powers or discretion are being fraudulently exercised.

By the articles it is left to the discretion of the directors to fix the day, hour, and place of the annual general meeting which is

(1) 2 H. & M. 10.
(2) Page 935.
(3) 2 Mac. & G. 216.
(4) Law Rep. 10 Ch. 606.

to be held in the month of August. Ample notice of the meeting summoned for the 3rd of August has been given, and any intention to exercise their powers otherwise than for the general benefit of the company, in strict conformity with the law and the provisions of the articles, is distinctly denied by the Defendants. The 3rd of August has been fixed as the period best suited to the wishes and convenience of the majority (who have objected to the lateness in the month at which the meeting has heretofore been held), and as the accounts and balance-sheet are ready and completed, and were in the hands of the shareholders on the 24th of July, there is no valid reason for postponing the meeting.

SIR JAMES BACON, V.C.:—

With regard to the defence of this case, no doubt there is a certain ingenuity about it; but in the argument and affidavit the entire point is altogether missed and left in utter silence. The law enables holders of shares to subdivide those shares in such way as they think fit for the purpose of increasing the votes at a meeting. The Plaintiffs would willingly exercise that power; that they possess it, is not disputed. The Defendants resort to a contrivance for the purpose of preventing their exercising that lawful power. That is the complaint in the bill, and there is not one word in the affidavits that at all touches that point, nor has there been one word addressed to it in the argument on behalf of the Defendants. What has been urged is the predominant power of the directors to act for the benefit of the company, and that the Court will not interfere with the internal arrangements of a company. The case of *Inderwick* v. *Snell* (1), and other cases, may be referred to to establish that which nobody ever thought of disputing, and which is not the question in this cause. The question is, whether the directors, who do not in their affidavit disavow their intention of holding this meeting in order to prevent the Plaintiffs from exercising their legal right, can be permitted to do so? That is the single question. They have appointed a day for the meeting, which under Art. 47 they are entitled to do, but they have done it at such a time and in such a manner as makes it

(1) 2 Mac. & G. 216.

V.-C. B. 1875 CANNON v. TRASK.

impossible for the Plaintiffs to have their votes recorded. The directors do not deny that in the slightest degree. They say, in making their excuse, that they have been in the habit of calling this meeting as soon as the accounts of the company were prepared and ready to be submitted to the meeting. No doubt it is for the direct advantage of the shareholders to know by the exhibition of the report and the balance-sheet in what circumstances the company stand, so that they may best exercise their right of voting. The affidavit then states that the annual general meeting has never hitherto been summoned before the accounts and balance-sheet and the reports of the directors have been sent to the shareholders. In every case in which the annual meeting has been summoned the annual reports, accounts, and balance-sheet have been sent to the shareholders, together with the notice summoning such meeting. In the present instance the notice was sent on Monday, the 19th of July, and the report and balance-sheet were not sent until the 24th of July. This I take to be unopposed, because, although I entirely concur in all that has been argued, and which is indisputable, as to the powers of the directors, the articles of association, and the general law of the subject, not one word has been said upon the only point on which the Plaintiffs rely, and which, as it is uncontradicted, entitles the Plaintiffs to the relief asked for by their motion.

Then it was said that the bill was demurrable. Why was it not demurred to? It would be a very fair question to try on demurrer; but if they admitted by demurrer the facts which the Plaintiffs allege in their bill, it is not for me to say what would have been the fate of the demurrer, although I can easily foresee it. I think the Plaintiffs are entitled to the injunction they ask for to prevent the meeting being held until after the 14th of August. There is no interference by this order which I make with the powers and duties of the directors.

An appeal from this order was, on the 31st of July, 1875, withdrawn on payment of the costs of all parties by the company.

Solicitors: Messrs. *Simpson & Cullingford*; Messrs. *Vallance & Vallance*, agents for Messrs. *Murly & Sons, Bristol.*

## *In re* ONSLOW'S TRUSTS.

V.-C. H.
1875
*June* 4.

1 & 2 *Vict. c.* 110, *ss.* 14, 15—*Charging Order—Infants' Relief Act*, 1874 (37 & 38 *Vict. c.* 62)—*Void Debt.*

A charging order under the Act 1 & 2 Vict. c. 110, ss. 14, 15, has no greater effect than an instrument of charge executed by the judgment debtor would have had.

Accordingly, where *D.*, after the passing of the *Infants' Relief Act*, 1874, obtained judgment by default against *O.* for a debt which was in fact for money lent by him to *O.* during *O.'s* infancy, and *D.* subsequently obtained a charging order upon a fund in Court belonging to *O.*:—

*Held*, that inasmuch as the debt on which the judgment and charging order were founded was void, the charging order was inoperative.

PETITION under the *Trustee Relief Act.*

Under the trusts of a marriage settlement dated the 10th of May, 1843, *Augustus Paul Lumsden Onslow*, as one of the children of the marriage, became, upon attaining the age of twenty-one years, entitled in possession to two sums of £679 4*s.* Reduced Bank Annuities, and £676 17*s.* 8*d.*, consols. On the 25th of August, 1874, *Onslow* attained the age of twenty-one years, and the trustees of the settlement, having received notice of certain charges affecting his share in the settlement funds, the validity of some of which was disputed by him, paid the above-mentioned sums into Court, under the *Trustee Relief Act*, on the 29th of October, 1874. A Petition for the payment out of Court of the fund was now presented by *Onslow*, by three of his incumbrancers whose charges were undisputed, and by a person to whom he had assigned the fund subject to the existing incumbrances upon it. This Petition was served upon *Samuel Osmond*, a fourth incumbrancer, who was entitled to a charge upon the fund under an undisputed memorandum of charge executed in his favour by *Onslow* on the 11th of December, 1874 (prior to the assignment of the fund), upon one *T. E. Dunn*, who claimed to have a charge on the fund, and upon the trustees. The only questions calling for a report were whether *Dunn's* charge was a valid one, and if so, whether it had priority over *Osmond's*.

V.-C. H. 1875 *In re* Onslow's Trusts.

The circumstances relating to *Dunn's* charge were as follows:—During *Onslow's* minority *Dunn* had lent him money, and after *Onslow* had attained twenty-one, *Dunn*, on the 22nd of October, 1874, obtained judgment by default against *Onslow* for £103 18*s.* 4*d.* On the 18th of November, 1874, *Dunn*, under the 14th and 15th sections of the *Judgments Act* (1 & 2 Vict. c. 110), obtained *ex parte* an order charging the fund in his favour, which order, under the 15th section, operated as an order to shew cause only, and such order *nisi* was made absolute on the 18th of December following; so that *Osmond's* charge was dated between the date of the order *nisi* and that of the order absolute. The debt in respect of which this judgment and charging order were obtained was for the money lent to *Onslow* during his infancy, as above mentioned. On the 7th of January, 1875, *Dunn*, upon summons in Chambers served on *Onslow*, obtained the usual stop order upon *Onslow's* share of the funds in Court in aid of his charging order at common law.

The present Petition prayed for payment to the three petitioning incumbrancers, and to the Respondent *Osmond*, of the amounts due on their respective incumbrances, and for payment of the balance of the fund to *Onslow's* assignee.

Mr. *Dickinson*, Q.C., and Mr. *Everitt*, for the Petitioners:—

*Dunn's* claim cannot be sustained, for we are at liberty to go behind the judgment he obtained and to shew that it was of no effect. By the *Infants' Relief Act*, 1874 (37 & 38 Vict. c. 62), s. 1, all contracts thenceforth entered into by infants for the repayment of money lent, or for goods supplied (other than contracts for necessaries), are absolutely void, and by sect. 2 of the same Act no action is to be brought upon any promise made after full age to pay any debt contracted during infancy, or upon any ratification after full age of any promise or contract made during infancy. This Act was passed on the 7th of August, 1874, shortly before the Petitioner *Onslow* came of age, which happened on the 25th of the same month. The debt upon which *Dunn's* judgment was founded was a debt contracted by *Onslow* during infancy for money lent, and not for necessaries; any contract, therefore, by *Onslow* to repay this debt was void, and could not be

ratified by him after he attained full age. Accordingly, the judgment being founded on this void contract, there was no valid consideration for it, and it was a nullity.

This has, in fact, been already decided by the Lords Justices in *Ex parte Kibble* (1), where their Lordships held that the Court of Bankruptcy would look into the consideration for a judgment, and they dismissed a petition for adjudication of bankruptcy against the present Petitioner *Onslow* because the judgment on which it was founded was for a void debt. The word "action" in the 2nd section of the *Infants' Protection Act* must be held to include a "suit": *Linford* v. *Gudgeon* (2). The judgment, therefore, being a nullity, the charging order founded upon it was of no effect whatever.

Mr. *Badnall*, for the Respondent *Osmond*:—

*Osmond* is an equitable mortgagee, and although his charge is subsequent in point of date to *Dunn's* judgment, it was obtained before *Dunn's* charging order was made absolute, and *Osmond* is entitled to priority over *Dunn*, even if *Dunn's* claim is allowed: *Scott* v. *Lord Hastings* (3).

Mr. *Caldecott*, for *Dunn*:—

*Dunn* has an absolute title under sect. 14 of 1 & 2 Vict. c. 110. A judgment debtor cannot go behind the judgment obtained against him without taking substantial proceedings to set it aside. *Ex parte Kibble* is no authority against this proposition; for that case was decided on the rule in bankruptcy, as laid down in *Ex parte Bryant* (4), that the Court of Bankruptcy can go behind the judgment, and examine the consideration on which it was founded. But that rule has no application to a case like this, and the judgment debtor must make out some special ground in order to entitle him to relief in equity: *Harrison* v. *Nettleship* (5). But even if the Court can go behind the judgment, the consideration on which it was founded in this case was good, for the *Infants' Relief Act* only applies to money lent or contracts made after the

(1) Law Rep. 10 Ch. 373.
(2) Ibid. 6 Ch. 359.
(3) 4 K. & J. 633.
(4) 1 V. & B. 211.
(5) 2 My. & K. 423.

V.-C. H. 1875 *In re* Onslow's Trusts.

passing of the Act, and here the money was lent before the passing of the Act. Moreover, the word "action" in the 2nd section does not include a suit in equity, and the operation of the section is confined to promises or contracts cognisable in a Court of Law only. Again, the order *nisi* charging the fund was obtained before the date of *Osmond's* equitable charge, and when the order was made absolute, the charge related back to the date of the order *nisi: Haly* v *Barry* (1). *Dunn's* charge, therefore, if good, has priority to that of *Osmond.*

Mr. *Ilbert,* for the trustees.

Sir Charles Hall, V.C. :—

The view that I take of this case is, that the charging order under the Act 1 & 2 Vict. c. 110, cannot have any greater operation than an instrument of charge signed by the debtor against whom the judgment was obtained.

In this case *Dunn* appears to have been in the position of a creditor who had obtained a judgment against his debtor, *Onslow,* but was without any specific charge on this particular fund. He obtained a charging order under the 14th and 15th sections of the Act, and under that Act, and by force of the charging order, he is to be treated as in the same position as if a charge upon this particular fund had been made in his favour and signed by the debtor. The Act first, in sect. 15, gives to the judgment creditor the means of obtaining a charge upon his debtor's stock, and then goes on to say that the person who obtained such charge is to be entitled "to all such remedies as he would have been entitled to if such charge had been made in his favour by the judgment debtor." It has been said that these words do not limit the title under the charging order, but I think that when we find a provision giving a charging order followed by a provision giving the party in whose favour the charge is made the same remedies as if the charge had been made by the judgment debtor himself—that is, the same remedies as would have existed under an instrument of charge signed by the debtor—it was intended that the judgment creditor shall, after the charging order, only be in as

(1) Law Rep. 3 Ch. 452.

favourable a position as if such instrument of charge had been executed to him by the debtor. Suppose, then, that an instrument had been executed by *Onslow*, giving a charge on these funds to *Dunn*, and *Dunn* had presented a petition to this Court for the payment out of the money assigned to him; then the question would be, is it competent on *Onslow* to say, "True it is that I executed this charge, or gave you this assignment, but there was no consideration for it; and now that you are coming to the Court for payment out to you of the fund, it is competent for me to shew that you are not such a creditor as, having regard to the *Infants' Relief Act*, the Court will recognise or allow. My position is that if I had executed that instrument it would have been inoperative, because the Act says that every attempt to set up such a debt as that under which you make your claim shall be inoperative. The bringing of actions upon promise or ratification after full age to pay a debt contracted during infancy, is the evil intended to be guarded against by the Act, and this evil the Act put me in a position to prevent. You cannot, then, present this Petition, and the Court will pay no attention to the ratification. You have, therefore, no charge at all except under the charging order; the charging order is to have no other effect than this instrument would have had, and that is none at all." That seems to me to be the proper interpretation to put upon the Act, and the only mode of working out the matter; and therefore I hold that Mr. *Dunn* has no claim at all, and that the fund must be distributed according to the prayer of the Petition.

Solicitors: Mr. *E. Parry;* Mr. *J. Terry;* Messrs. *Hubbard, Son, & Eve;* Messrs. *Burne & Parker.*

V.-C. H.
1875
June 21, 22

## TAYLOR *v.* GILLOTT.

[1874 T. 9.]

*Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *s.* 23—*Leaseholds—Disclaimer by Trustee—Rights of Third Parties—Underlessee.*

The lessee of a house agreed to underlet a portion of it at less rent than he paid and taking a premium, and the provisions of the agreement differed in material respects from those of the lease. The underlessee paid the premium and took possession under the agreement. The lessee afterwards became bankrupt; his trustee in bankruptcy disclaimed the lease; and the lessor commenced an action of ejectment against the underlessee.

Upon bill filed by the underlessee to restrain the action of ejectment and compel the lessor to grant him a lease in accordance with the terms of his agreement with the lessee:—

*Held*, that the underlessee had no equity to compel the lessor to grant him a lease in accordance with the terms of the underlease, and bill dismissed with costs.

By an indenture of lease dated the 18th of March, 1868, the Defendant, *William Henry Gillott*, and *Charles Bird Kelham* since deceased, as the executors of *George Gillott*, deceased, demised the messuage and premises No. 36, *Strand*, in the county of *Middlesex*, to *John Pask*, his executors, administrators, and assigns, for a term of twenty-one years from the 25th of March, 1868, at the yearly rent of £400. The lease contained covenants by the lessee to pay the rent and taxes, to repair, and keep and deliver up in "good and substantial repair," to paint inside once in three years, and outside once in seven years, not to carry on certain trades, and not to assign or underlet without license; and by the lessors to keep the premises insured, and apply the insurance moneys in rebuilding, the lessee repaying the premiums; with a proviso for re-entry by the lessors on non-payment of rent or breach of covenant by the lessee.

*Pask* took possession under this lease, and by an agreement in writing dated the 18th of October, 1871, he agreed to grant to the Plaintiff, *E. A. W. Taylor*, and the Plaintiff agreed to take, a lease of the ground floor and basement of the premises No. 36, *Strand*, for the term of eighteen years from the 25th of December, 1871, at the yearly rent of £200, and subject to the stipulations on the Plaintiff's part therein contained. The provisions of the

agreement differed from the lessee's covenants contained in *Pask's* lease, in that the tenant under the agreement was bound to keep and maintain the premises "in good and tenantable repair, damage by fire only excepted;" that the agreement contained no stipulation as to painting, and no absolute prohibition against assigning or underletting without license, but only a stipulation that the tenant should not assign or underlet "to a tailor." And there was also a difference as to prohibited trades, which, with the other distinctions between the two instruments, is pointed out in the judgment of the Vice-Chancellor. The period of eighteen years fixed as the duration of the term was, as it appeared, fixed by mistake, and it was unquestioned that the real arrangement was that the Plaintiff should take an underlease for *Pask's* term less a reversion of a few days. The Plaintiff paid to *Pask* for this agreement a premium of £100, and took possession on the 19th of October, 1871. He subsequently, on the 31st of October, 1871, entered into an agreement in writing to underlet the same premises to a firm of *B. Hembrey & Co.* (of which his son, *A. E. Taylor*, was a member) for his term under the agreement with *Pask*, less two days, at the yearly rent of £250, and subject to agreements similar to those contained in that agreement. Under this second agreement, *B. Hembrey & Co.* took possession, and they were in possession at the date of the filing of the bill.

In the month of March, 1872, *Pask*, having committed breaches of the covenants in his lease by omitting to pay rent and otherwise, was adjudicated bankrupt on the petition of the Defendant and *Kelham*, and on the 8th of April the Defendant and *Kelham* served upon *Pask's* trustee in bankruptcy a notice in writing pursuant to sect. 24 of the *Bankruptcy Act*, 1869, requiring him to decide whether he would disclaim *Pask's* lease. The trustee in bankruptcy then, with the leave of the Court, on the 24th of May, by writing under his hand pursuant to the 23rd section of the *Bankruptcy Act* (1), disclaimed all the estate and interest in him in the term of years created by the lease.

(1) The 23rd section is shortly as follows:—

"Where any property of the bankrupt acquired by the trustee under this Act consists of land of any tenure burdened with onerous covenants . . . . the trustee . . . . may, by writing under his hand, disclaim such property, and

V.-C. H. 1875 TAYLOR v. GILLOTT.

The Plaintiff contended that the effect of the disclaimer was to merge the term granted by the lease to *Pask* in the immediate reversion of the Defendant and *Kelham*, subject nevertheless to the agreement of the 18th of October, 1871, and that the Defendant and *Kelham*, as surrenderees of the term granted to *Pask*, became bound to carry out and observe the agreement between *Pask* and him. They, however, declined to treat the Plaintiff as their tenant, and after some fruitless negotiations with him as to granting him a fresh lease upon certain terms, during the course of which *Kelham* died, the Defendant brought an action of ejectment against the Plaintiff and his sub-tenants, *B. Hembrey & Co.* The Plaintiff then filed the present bill, offering to accept and execute a counterpart of a lease to be granted to him of the premises, the subject of the agreement of the 18th of October, 1871, according to the terms of that agreement, and containing all reasonable and proper covenants, clauses, and conditions; and he prayed that the Defendant might be ordered to execute a proper lease to him of those premises for the then residue of the term at the rent and in accordance with the terms mentioned in the agreement, and that in the meantime the Defendant might be restrained from proceeding with his action of ejectment.

No written consent to the agreements of the 18th or 31st of October, 1871, was obtained by the Plaintiff from the Defendant and *Kelham*, the original lessors; and part of the case made by the bill and sought to be established by the Plaintiff, by his evidence and by cross-examination, was, that the Defendant was aware of his intention to enter into the first agreement; that before he entered into either of the agreements the Defendant had stated to his son that the original lease contained no covenant against underletting; moreover, that the Defendant and *Kelham* had by

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upon the execution of such disclaimer, the property disclaimed shall, .... if the same is a lease, be deemed to have been surrendered on the same date. Any person interested in the disclaimed property may apply to the Court, and the Court may, upon such application, order possession of the disclaimed property to be delivered up to him, or make such other order as to the possession thereof as may be just.

"Any person injured by the operation of this section shall be deemed a creditor of the bankrupt to the extent of such injury, and may accordingly prove the same as a debt under the bankruptcy."

the acceptance of rent from the Plaintiff, and by their conduct to and dealings with him, recognised his tenancy, and had become bound in equity to perform the agreement in the place of *Pask*. All this, however, was denied by the Defendant, and, as the Vice-Chancellor held, was not established by the Plaintiff's evidence.

Mr. *Dickinson*, Q.C., and Mr. *Romer*, for the Plaintiff:—

The Plaintiff has a binding agreement giving him in equity the position of tenant of a portion of the premises, and the Defendant, the landlord, although he has notice of the equity, is availing himself of his legal position to turn the Plaintiff out. First, as to the operation of the disclaimer. The 23rd section of the *Bankruptcy Act*, 1869, puts the landlord in the position in which he would have been if he had contracted for a surrender of the lease, but it never could have been intended prejudicially to affect the equitable interests of third parties, or to revest the demised premises free from all sub-lettings. The only argument against this is the hardship which might be occasioned to the landlord, and it is true that it might be a great hardship upon a lessor if an underlease granted by his lessee at a small or nominal rent should remain after the lease itself had been disclaimed; but unless there was fraud the underlease could not be set aside. But however this might be, it would be a still greater hardship upon an underlessee, who had paid, it might be, a very large premium for his underlease, to be turned out; while for the landlord's case a remedy is provided by the section; he can shew that he is a person injured by the operation of the disclaimer, and can go in and prove under the lessee's bankruptcy for the amount of his injury: *Ex parte Lynvi Coal and Iron Company* (1). That case and the case of *Smyth* v. *North* (2) shew that the equities of third parties are not affected by the section. In the latter case it was held that a disclaimer under sect. 23 by the trustee of the assignee of a lease does not affect the rights and liabilities, *inter se*, of the lessor and lessee, but only the relations between the bankrupt and his trustee and the lessor.

The hardship upon the landlord, then, is one consequent upon the legal and equitable effect of the transactions, and one for

(1) Law Rep. 7 Ch. 28. (2) Law Rep. 7 Ex. 242.

V.-C. H. 1875 TAYLOR v. GILLOTT.

which the Act has provided a remedy; and were it otherwise, if the words of the Act were clear, effect must be given to them in spite of any hardships that might ensue. Moreover, the landlord might have determined the lease, instead of which he himself made *Pask* a bankrupt, and caused the disclaimer to be made. Thus the hardship, if any, flowed from his own act.

If a purchaser has notice of a tenancy, he has notice of all the terms of a tenancy; and here, after disclaimer, the Defendant accepted rent for a tenancy of some kind.

They then, secondly, contended that the Defendant and his cotrustee had by their acts and conduct adopted the Plaintiff's agreement with *Pask*.

As to the effect upon the rights of third parties of the acceptance or rejection of a bankrupt's leaseholds by his assignee under the old law, they referred to *Ex parte Clunes* (1); *Ex parte Varley* (2); *Ex parte Fletcher* (3).

Mr. *Karslake*, Q.C., and Mr. *Dumergue*, for the Defendant:—

What might have been the operation of the disclaimer in a case where the underlease was of the same property and upon the same terms as the lease, is not the question here. The alleged underlease here is of a portion of the property, at a smaller rent, for a premium, and with stipulations differing in important respects from those in the lease. In such a case it cannot be contended that when the lease, which is the prop of the underlease, is gone, the underlease, which is the thing propped up, is to remain. Before the Plaintiff can ask the lessor to grant him an underlease at the rent of £250, and upon the other terms of the agreement, he must be able to put the lessor in the position of having a solvent lessee to pay *Pask's* rent of £400, and to perform his other liabilities in *Pask's* place, and this he cannot do. His contention, in fact, amounts to this, that by some juggle of the statute the landlord has become both lessor and lessee, and must pay himself his own rent, and look to himself to perform his own covenants. The alleged equity of the Plaintiff has no application, and if it had, and a contract were established, the Court would not decree

(1) 1 Madd. 76. (2) 3 M. D. & D. 340.
(3) 1 D. & Ch. 356.

specific performance of it to the injury of the *cestuis que trust* of the Defendant: *White* v. *Cuddon* (1); *Fry* on Specific Performance (2); nor is there any alternative jurisdiction to award damages: *Durell* v. *Pritchard* (3). The Plaintiff's remedy, if any, is at law.

They then contended that the Plaintiff had entirely failed in shewing that the acts and conduct of the Defendant and his co-trustee amounted to a recognition of *Pask's* agreement with him.

Mr. *Dickinson*, in reply, contended that the Defendant must be in the same position as if he had voluntarily taken a surrender from *Pask*, his lessee, with the knowledge of the Plaintiff's equity.

SIR CHARLES HALL, V.C.:—

The Plaintiff in this case seeks to have a lease granted to him in accordance with an agreement dated the 18th of October, 1871, modified, however, so as to be an underlease for a term less than the original term of Mr. *Pask*, who held under a lease granted to him by the Defendant and his deceased joint tenant as trustees. [The Vice-Chancellor then stated the facts of the case down to the disclaimer by the trustee in bankruptcy, and continued:—] The effect of that disclaimer in that state of things, there not having been a lease actually granted to the intended underlessee, has been the subject of discussion in the course of the arguments before me, and it raises a question not without difficulty; but, for the purpose of considering the effect of that disclaimer by the trustee in bankruptcy, it is necessary, I think, to consider, first of all, what was the original contract by the original lessors in granting the lease; and next, how far the contract for the underlease harmonizes and accords with the original contract entered into by the original lessors. I think the contention must be taken to have gone as far as this, that if an original lessee grants an underlease on his own terms of a portion of the property originally demised at a nominal rent instead of a substantial one, taking a premium, and it may be a very considerable one,—in such a state of things the effect of this disclaimer, which is to have the force

(1) 8 Cl. & F. 766.
(2) Page 114.
(3) Law Rep. 1 Ch. 244.

V.-C. H. 1875 TAYLOR v. GILLOTT.

of a surrender, is to leave that undertenancy subsisting as against the original lessors, who must content themselves with receiving whatever rent the original lessee may have thought fit to reserve by that underlease, and only take the benefit of such covenants as the lessee may have covenanted with his underlessee to have the benefit of as between himself and such underlessee. It is not necessary, however, to go so far in the present case as to determine that question, because the way in which the case is presented to the Court by the Plaintiff in this bill is this: He says, first, there was the original lease; next, there was this agreement for the underlease of the 18th of October, 1871; and he says in his bill that that was an agreement for an underlease at a rent of £200, "subject to agreements by the Plaintiff relating to the premises thereby agreed to be demised similar to and in accordance with the covenants by the said *John Pask* contained in the said lease of the 18th of March, 1868." I suppose that was the view entertained at the time this bill was drawn, before the thing had been very carefully examined. The further underlease to *Hembrey & Co.* is also stated to be of a similar kind, that is to say, all the provisions harmonize one with the other; and if the case had been one of an underlease of the whole of the property comprised in the original lease, and if the covenants had been the same in all respects, there might be something, and probably much, to be said as to what the effect of the surrender by means of the disclaimer was with reference to the underlease, although the original lease might drop. But that a lessor who has agreed to grant a lease at a certain rent, and subject to certain stipulations, is to find himself suddenly in this position—that by reason of the bankruptcy of his tenant, who has granted an underlease, he is to be obliged to remain until the end of the term granted by the underlease, entitled only to the benefit of such covenants as his lessee may have obtained from the underlessee, is to my mind a very startling doctrine, and I am surprised to hear that such a thing should be asserted. Now, what are the provisions of the agreement of the 18th of October, 1871, comparing them with the stipulations which the original landlords bargained for when they agreed to part with the property for twenty-one years? In the first place, it is to be observed that the

stipulation as to repair is substantially different in the agreement for the underlease from what it is in the original lease. In the agreement of October 18th the intended underlessee is bound to "keep and maintain the said premises in good and tenantable repair, damage by fire only excepted." I will stop there first. There is no such exception as to fire in the original lease. There are some clauses as to the property being first insured by the landlord, and for his then being repaid by the tenant the amount he may have paid for premiums, but there is no such exception as there is in the underlease; and even if it might be considered to come to the same thing, it is observable that the covenant to repair—and that is what I was more particularly alluding to—is, "to keep in good and tenantable repair." As I have already said, it is not, as in the original lease, "to keep in substantial repair."

Then I observe that, this being a building consisting of a messuage and shop, there is in the agreement for the underlease no stipulation whatever for painting, while there are in the original lease careful provisions as to painting at three and seven years' interval. Again, there is in the agreement for the underlease no absolute prohibition against assigning or underletting. I am assuming that what took place in this case may have amounted, and probably did amount to a waiver of any forfeiture in that respect, because underletting for one year would be just as objectionable to the original clause as underletting for the whole term minus one year. But, assuming a waiver in that respect by conduct, I think a waiver by conduct is not the same thing as granting a license under the old law. Formerly the effect of granting a license was held not to be totally inconsistent with the provision, but we have got no such provision here. The clause in the agreement of the 18th of October is, that the tenant "will not alter, assign, or underlet the said premises to any person or persons who shall carry on the trade of a tailor." That is only a qualified prohibition. No license at all is required. The underlessee may underlet and assign, provided he does so to some person who does not carry on the particular business named.

Then, further, as regards the particular trades which are prohibited in the agreement of the 18th of October, 1871, there are only two particular trades enumerated, and then follow these other

V.-C. H. 1875 TAYLOR v. GILLOTT.

words, "or other obnoxious trades." I am not at all satisfied that those words would cover every one of the trades mentioned in the original lease. That is a substantial matter. A landlord may well stipulate, and it is often a very material thing for him to do, that particular trades shall not be carried on.

Again, there is no covenant by the lessee to repay the landlord any sums which he may have paid for insurance, or anything equivalent to what there is in that respect in the original lease.

Then there is no covenant to repair upon notice, which there was in the original lease, and which is a substantial as well as usual covenant; and moreover—and this is most important—there is no power to enter for breach of covenant anywhere to be found in the agreement of the 18th of October, 1871.

It is said that the effect of what has taken place in this case is that the landlords, represented by the Plaintiff, are bound now to grant a lease according to this agreement of the 18th of October, 1871, to the Plaintiff, who was intended to be the lessee of Mr. *Pask*, but who is now, if the relief asked by this bill is granted, to become the lessee of the original landlords. I do not find anything in the Act of Parliament to give such an operation or effect to the disclaimer and the surrender. What would have been the effect if the lease had been actually granted, treating the breach of covenant, so far as regards assigning, as being waived, it is not necessary for me to say. I do not, however, mean to say that it would have had any different effect at all; but of this I am satisfied, that it never was or could be intended that where a landlord has by his original lease granted property only for a certain term, reserving to himself certain stipulations and provisions determining the mode in which his property is to be made use of in respect of particular trades and otherwise, and reserving to himself a power of re-entry in case of breach of the covenants in the lease generally, that in such case a surrender, like this, not merely of the property comprised in the underlease, but of the property so granted by the lease, should, without any act of the landlord's which ought to operate to his prejudice, have the effect of putting him into a position entirely different from that in which he intended to be. Therefore I cannot apply the clause of the statute in question so as to produce that effect, and I do not consider that it can have

that effect, at all events in this Court; and when this Court is asked to make the surviving lessor of an original lease grant *de novo* a new lease to these parties, under the circumstances of this case I must say that, in my judgment, it would be so inequitable to do it, that I shall certainly, on that ground alone, refuse the Plaintiff the relief which he asks.

In saying that, I have been dealing with the general question under the Act of Parliament, but I must now proceed to say something of the way in which it has been endeavoured to make out the Plaintiff's case. It is said that the Defendant ought to grant this lease, because he has, according to the evidence, been aware that it was intended to grant this underlease, and that he has received rent under this underlease, and has acted upon the footing of there being in existence such an agreement; in fact, that he has adopted that agreement, and therefore that he must be bound by it, and specifically perform it. The evidence, however, by no means comes up to making out any such case as that; taking the oral and the written evidence together, it, to my mind, falls very far short of it.

As to whether there was or was not a statement that the property could not be underlet by *Pask*, the balance of evidence is, in my judgment, that the Plaintiff was informed that *Pask* could not underlease.

As regards the payments of rent and the circumstances under which those payments were made, upon the evidence it appears to me not a just or true conclusion that rent was ever received by the Defendant, or by him and his co-trustee, as rent under the alleged agreement of the 18th of October, and it is not in that way made out that they have adopted and are bound by that agreement.

Upon the case made by the Plaintiff, I consider that he fails upon the law as regards the construction and effect of the Act of Parliament, and also upon the facts as applicable to the special case of a contract, by acts and conduct.

It has been said that the landlords themselves have produced this result, by petitioning under the bankruptcy to make *Pask* bankrupt. But I cannot hold that they were not justified in taking the proceedings and adopting the course which the law

V.-C. H. 1875 TAYLOR v. GILLOTT.

allowed them to take, or that there is any equity arising out of their so doing.

Upon the whole, it appears to me that the Plaintiff's case is not established, that the bill must be dismissed, and with costs.

Solicitors: Messrs. *Linklater & Co.*; Mr. *Warriner*.

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V.-C. H. 1875 *June* 30.

## MILLS *v.* CAPEL.

[1875 M. 124.]

*Statute of Limitations* (3 & 4 *Will.* 4, *c.* 27), *s.* 23—*Tenant in Tail—Defective Assurance—Subsisting Life Estates—Possession.*

Lands limited in equity to *T.*, *F.*, and *F.*'s wife *E.* successively for life, with remainder to the first and other sons of *F.* and *E.* successively in tail male, with remainder to *F.* in tail general, with remainders over, were in the year 1835, without the consent of *T.*, the protector of the settlement, by deed inrolled, reciting, contrary to the fact, the seisin in fee simple of *F.*, conveyed by *F.*, *E.* joining to transfer or bar her dower, to a purchaser in fee simple; and the purchaser then entered into possession. *T.* died in 1848, *F.* died without issue in 1859, and *E.* died in 1873:—

*Held*, that until 1873 the possession of the purchaser was a possession by virtue of the subsisting life estates, and not of the estate tail in remainder of *F.*, and, consequently, was not a possession the continuance of which for the period of twenty years would, under the 23rd section of the *Statute of Limitations*, bar the remainders over.

### DEMURRER.

The material allegations of the bill were shortly as follows:—

By an indenture dated the 28th of May, 1802, freehold lands in the parish of *Chipstable*, in the county of *Somerset*, were limited in the usual manner to such uses as *Francis Mead* the elder and *Thomasin* his wife should jointly appoint, and in default to the use of *Francis Mead* the elder for life, with remainder to the use of *Thomasin Mead* for life, with remainder to the use of such child or children of *Francis Mead* the elder and *Thomasin Mead* as the survivor of them should by deed or will appoint, and in default of such appointment to the use of *Francis Mead* the younger in tail general, with remainder to the use of *Edward Mead* in tail general, with remainders over.

By an indenture dated the 25th of November, 1814, and made between *Francis Mead* the elder and *Thomasin* his wife of the first part, *Francis Mead* the younger of the second part, *Elizabeth*, afterwards the wife of *Francis Mead* the younger, of the third part, and *George Peppin* of the fourth part, in consideration of a marriage then intended and afterwards solemnised between *Francis Mead* the younger and *Elizabeth Mead*, and in order to make some provision for them and for the issue of the marriage, *Francis Mead* the elder and *Thomasin Mead*, in exercise of their power appointed all the premises comprised in the settlement of 1802, unto *George Peppin*, his heirs and assigns, to hold the same after the solemnisation of the marriage to the use of *Francis Mead* the elder for life, with remainder to the use of *Thomasin Mead* for life, with remainder to the use of *Francis Mead* the younger for life, with remainder to the use of *Elizabeth Mead* for life or widowhood, with remainder to the use of the first and other sons of *Francis Mead* the younger and *Elizabeth Mead* successively in tail male; and in default of such male issue living at the death of the survivor of *Francis Mead* the younger and *Elizabeth Mead*, then to the same uses, upon such trusts, and for such intents and purposes, as were declared concerning the same in the indenture of 1802, or such of them as should then be subsisting and capable of taking effect.

*Francis Mead* the elder died in the year 1828.

At the dates of the indentures of May, 1802, and November, 1814, the owners and occupiers of the settled lands were entitled to certain rights of common over waste lands, parcel of the manor of *Chipstable*, of which *John Stone* was lord.

In the year 1834 the *Chipstable Inclosure Act* was passed for the purpose of allotting and inclosing the waste lands of the manor, which Act provided amongst other things that in case any person entitled to an allotment should sell his interest in the waste lands before the award the Commissioner should make the allotment to the purchaser.

In anticipation of the award making an allotment in respect of the settled lands, by an indenture (made without the consent of *Thomasin Mead*, then the protector of the settlement) dated the 31st of January, 1835, and duly acknowledged and inrolled, after

V.-C. H. 1875 MILLS v. CAPEL.

reciting the *Chipstable Inclosure Act*, and (contrary to the fact) that *Francis Mead* the younger was seised in fee simple of the settled lands, and after reciting that *Francis Mead* the younger had agreed with *John Stone* for the sale to him of all his right in the said waste lands, and that *Elizabeth Mead* his wife had agreed to join in the conveyance for the purpose of barring or transferring her dower, *Francis Mead* and *Elizabeth* his wife conveyed to *John Stone* in fee simple all the right and interest of them the said *Francis Mead* the younger and *Elizabeth* his wife in the waste lands in the parish of *Chipstable*, and in every allotment which might be made in respect of the settled lands.

The award under the *Inclosure Act* was made on the 19th of May, 1837, and the Commissioner awarded and allotted to *John Stone*, as the purchaser thereof, the waste lands awarded in respect of the settled lands, and he allotted at the same time other waste lands to *John Stone*, without specifying the particular portion allotted in respect of the purchase from *Francis Mead* the younger.

*John Stone* immediately entered upon the waste lands so allotted to him, and either he or the Defendant, who afterwards purchased them from him, had been in possession of them ever since.

*Thomasin Mead* died in July, 1848, without having made any further appointment of the settled lands, and without having done any act to confirm the conveyance of the 31st of January, 1835.

*Francis Mead* the younger died in May, 1859, without issue, and without having, after the death of *Thomasin Mead*, done any act to confirm the title of *John Stone* or the Defendant.

*Elizabeth Mead*, the surviving tenant for life, died June, 1873.

The present bill was filed by *James Mill*, who derived his title under a proper disentailing assurance executed by the issue in tail of *Edward Mead*. And after averments to the foregoing effect, the Plaintiff stated that he was unable to commence an action of ejectment to recover possession of the settled lands, because *George Peppin*, in whom the legal estate in the settled lands was vested, had died many years ago intestate, and the Plaintiff could not ascertain in whom the legal estate was now vested; and, moreover, because the boundaries of the allotments had been confused, and he was unable to ascertain, without discovery from the Defendant, the exact proportion which the settled lands bore to the

other tenements in respect of which allotments were made to *John Stone*. The Plaintiff then submitted that he was tenant in common with the Defendant in the lands allotted to *John Stone* in certain undivided shares, to be ascertained with reference to the quantity and value of the settled lands compared with the quantity and value of the other tenements in respect of which the allotment to *John Stone* was made, and he prayed by his bill that the Defendant might make discovery where the allotted lands were situate, what were the boundaries thereof, and what portion (if any) of the allotment was made in respect of the settled lands, or if it should appear that no specific allotment was made in respect of them, that the Defendant might discover the acreage and value of the whole of the tenements in respect of which the allotment was made, and the proportion which the settled estates bore thereto, and in that case that the Plaintiff might be declared to be tenant in common of the allotted lands with the Defendant in undivided shares, to be ascertained with reference to the proportion which the quantity and value of the settled estate bore to that of the other tenements in respect of which the allotment was made, and that a partition might be made accordingly; and also for an account of the rents and profits since the death of *Elizabeth Mead*, and for payment to the Plaintiff of his proportion thereof.

To this bill the Defendant demurred.

Mr. *W. Pearson*, Q.C., and Mr. *Spencer Vincent*, for the Defendant, in support of the demurrer:—

Possession has continued under the assurance of 1835 from its date until now. *Thomasin Mead*, the protector of the settlement, died in 1848, and more than twenty years has elapsed since that time, which was the time at which, following the language of the 23rd section of the *Statute of Limitations* (3 & 4 Will. 4, c. 27), "such assurance, if it had then been executed" by *Francis Mead* the younger, "would, without the consent of any other person," have barred the remainder over.

It is true that *Elizabeth Mead* lived until 1873, and assuming her life estate not to have been merged by the conveyance of 1835, the remainderman could not sooner have entered; but that

V.-C. H. 1875 MILLS v. CAPEL.

is immaterial. This section does not regard the time when the remainderman can first enter. Suppose a base fee immediately expectant on the death of the protector to have been well created, the remainderman could not have entered, although neither could the issue; and all would have been barred at the end of twenty years after the protector's death without having had a chance of preventing the time running. The Act, in fact, shifts the assurance to the year 1848. Time has accordingly run against the Plaintiff, the right of the Defendant is absolute, and the demurrer will lie.

Mr. *Davey*, Q.C., and Mr. *Crossley*, in support of the bill:—

The possession under the 23rd section of the *Statute of Limitations* must be possession by virtue of the estate tail. Possession under the assurance of the tenant in *tail quâ* tenant in tail did not commence until the death of *Elizabeth*, in 1873. Although there was only one deed (that of 1835), that deed operated as three, or at least, as two assurances; first, of *Elizabeth's* life estate; secondly, of *Francis Mead's* estate in tail. Her estate was not merged in his notwithstanding the joint conveyance, the contingent remainder to the issue preventing any merger. There has, therefore, been no such possession as will bar the remainder, by virtue of which the Plaintiff claims, but only a possession under an assurance by a tenant for life, which is not sufficient: *Morgan* v. *Morgan* (1).

Mr. *Vincent*, in reply:—

There is no ground in sect. 23 for holding that the possession which is to operate as a bar must be carved out of, or be in virtue of the estate tail. A mere secret conveyance, followed by no change of possession, would be insufficient; but the section is satisfied if there be an assurance of such a kind, made by a person so qualified as to pass a base fee, and possession be taken by the grantee "at the time of the execution of such assurance, or at any time afterwards." And this is made clearer by what follows: "And the same person or any other person whatsoever (other than some person entitled to such possession in respect of an estate" in

(1) Law Rep. 10 Eq. 99, 104.

remainder) "shall continue to be in such possession," &c. Here "possession" must mean the same in both clauses, and in the parenthesis "such possession" cannot possibly mean possession by virtue of the estate tail.

SIR CHARLES HALL, V.C.:—

This demurrer must be overruled. In my opinion the 23rd section of the *Statute of Limitations* does not apply, for the reasons given by Mr. *Davey* in his argument, and upon the authority of *Morgan* v. *Morgan* (1). Moreover, I observe it stated in *Sugden's* Real Property Statutes (2) that one of the propositions of the Real Property Commissioners was that on any alienation by a tenant in tail by any assurance not operating as a complete bar to the estate tail, and all estates, rights, and interests limited to take effect on the determination or in derogation of it, possession under such assurance should have the same effect in barring the estate tail, and all estates, rights, and interests so limited, as if such possession had been adverse to the estate tail, or to such estates, rights, and interests. And in commenting upon this proposition Lord *St. Leonards* says: "These intentions were carried into effect by the enactment in the 23rd section before quoted, which requires a possession or receipt for twenty years next after the commencement of the time at which such assurance, if it had then been executed by the tenant in tail or the person who would have been entitled to his estate tail if such assurance had not been executed, would, without the consent of any other person, have operated to bar such estate or estates as aforesaid, at the end of which twenty years such assurance is made effectual against any claimant after or in defeasance of such estate tail. The assurance referred to is the one made by the tenant in tail. The operation of the clause, therefore, is not strictly to make time a bar, but to make time give a full operation to the assurance executed by the tenant in tail."

It was intended to legislate for the case of possession under a base fee; now in this case there was not until 1873 any possession under a base fee, the possession previous to that year having

(1) Law Rep. 10 Eq. 99.

(2) 2nd Ed. p. 86.

V.-C. H. 1875 MILLS v. CAPEL.

been by virtue of the life estates of *Francis Mead* the younger, and *Elizabeth* his wife. The fact that the same deed which passed those life interests also passed a base fee does not affect the character of the possession held by the purchaser. The "possession" "by virtue of such assurance," to be effectual under the 23rd section, must be a possession by virtue of an assurance which turned an estate tail into a base fee. Were this not so, remainders over might be barred by possession under a tenant for life. This demurrer must accordingly be overruled.

Solicitors for the Plaintiff: Messrs. *Syms & Son.*
Solicitors for the Defendants: Messrs. *Shepheard & Sons.*

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V.-C. H. 1875 *June* 30. *July* 1, 3.

## FANE *v.* FANE.

[1873 F. 33.]

*Family Settlement—Setting aside—Consideration—Release of Charge—Mistake.*

A family settlement will not be supported if founded on a mistake of either party to which the other party is accessory, although such mistake may have been innocently made.

A son, tenant in tail in remainder, shortly after attaining twenty-one joined with his father, the tenant for life, in re-settling the family estates. The son was influenced to make the re-settlement by the representation of his father that a portions' charge of £5000 was not (as in fact it was) a subsisting charge on the estates, but was a charge to take effect only in case the father should so direct, and a release of the supposed power to charge contained in the re-settlement was the principal consideration for its execution:—

*Held*, that, although this misrepresentation was innocently made, the re-settlement must be set aside as founded on mistake.

BY articles entered into on the 25th of August, 1832, in consideration of an intended marriage between *Lucy Harriet Benett* (who was tenant in tail in remainder of certain settled estates) and *Arthur Fane*, *Arthur Fane* and *Lucy Harriet Benett* covenanted that in case the marriage should take effect, and *A. B. Lambert* and *John Benett* the elder (who were entitled to life interests in the settled estates) should consent, then the said *Arthur Fane* and *Lucy Harriet Benett* would, when *Lucy Harriet Benett* should come

into possession of the settled estates, or prior thereto with the concurrence of *A. L. Lambert* and *John Benett* the elder, or such of them as would consent, suffer or join in suffering a recovery of, and settle or join in settling the estates to the use of such persons, for such estates and subject to such powers as *A. B. Lambert* and *John Benett* the elder, or such one of them as should concur in the settlement, should, together with *Arthur Fane* and *Lucy Harriet* his wife, or the survivor of them, by the recovery deed jointly appoint; and in default, to the use of trustees their executors administrators and assigns, for ninety-nine years, if *Arthur Fane* and *Lucy Harriet* his wife should so long live, in trust to pay the rents to *Lucy Harriet Fane* during the joint lives of herself and *Arthur Fane*, with remainder to the use of *Arthur Fane* and his assigns for his life, without impeachment of waste, with remainder to the use of *Lucy Harriet Fane* for life, without impeachment of waste, and after the decease of *Arthur* and *Lucy Harriet Fane*, to the use of trustees their executors and administrators, for the term of 1000 years upon the trusts thereinafter declared, and subject thereto, to the use of the first and every other son of *Lucy Harriet Fane* by *Arthur Fane*, or any after-taken husband, in tail male, with similar limitations to the sons of *Lucy Harriet Fane*, in tail general, followed by successive limitations in tail male and in tail general in favour of her daughters, and with divers limitations over. And it was declared that the trusts of the term of 1000 years should be trusts by and out of the rents, or by sale or mortgage of the estates, or by other usual ways or means, to raise the sum of £5000 for the portion of the daughters (other than an eldest or only daughter entitled in tail under the limitations aforesaid) and younger sons of the marriage, and to pay the same at such times and in such manner as *Arthur Fane* and *Lucy Harriet Fane* should during their joint lives by deed, or the survivor of them should by deed or will appoint, and in default equally among such child or children at twenty-one or marriage.

Shortly after the date of this indenture *Arthur Fane* and *Lucy Harriet Benett* intermarried.

By indentures of lease and release, dated the 8th and 9th of November, 1833, to which release *A. B. Lambert*, *John Benett*, the

V.-C. H. 1875 FANE v. FANE.

elder, *Arthur Fane*, and *Lucy Harriet*, his wife, were parties, after correctly reciting the articles of the 25th of August, 1832, including the provisions therein contained as to the term of 1000 years for raising portions, and that by virtue of a common recovery duly suffered in pursuance of the said articles the estates were conveyed and assured to the intent that the recovery should enure and the lands stand and be limited as in the indenture of release expressed, it was by the indenture of release declared that, subject to the estates subsisting in priority to the estate tail of *Lucy Harriet Fane*, and to certain charges therein specified, the lands should stand limited to uses similar to those specified in the articles, including a limitation of a term of 1000 years to *M. Beresford* and *H. K. Seymer* their executors administrators and assigns. And it was declared that the lands were so limited to them upon trust that if there should be any child or children of *L. H. Fane* and *Arthur Fane* (other than an eldest or only daughter entitled as aforesaid), "then and in such case they, the said *M. Beresford* and *H. K. Seymer*, or the survivor of them, their or his executors, administrators, or assigns, should after the decease of the survivor of them, the said *A. B. Lambert*, *John Benett*, the elder, *Arthur Fane*, and *Lucy Harriet*, his wife, or the survivor of them, if they, he, or she shall so direct by any deed or writing," by any of the ways and means therein mentioned, raise the sum of £5000 for the portion or portions of such child or children (other than as aforesaid), the said sum to be in trust for all or such one or more of them, to be an interest vested, and to be paid at such times, and if more than one in such proportions and in such manner, as *Arthur Fane* and *Lucy Harriet*, his wife, should by deed jointly, or the survivor of them should by deed or will appoint, and in default amongst such child or children in equal shares, and to be vested interests in such children, being sons, at twenty-one, and being daughters at twenty-one or marriage, in the usual manner.

Thus the charge of £5000 for portions which, under the articles was an absolute charge, was, according to the language of the settlement purporting to be made in pursuance of the articles, only to take effect if *Arthur Fane* and *Lucy Harriet*, his wife, should "so direct."

No direction to raise, or appointment of, the sum of £5000 was ever given or made.

*Lucy Harriet Fane* died in the year 1845, having had issue the Plaintiff *Edmund Douglas Veitch Fane*, her first-born son, the Defendant, *Henry Arthur Fane*, *Vere Fane* (afterwards *Vere Fane Benett Stanford*), and three other children. Prior to the year 1858, *A. B. Lambert* and *John Benett*, the elder, both died. On the 6th of May, 1858, the Plaintiff attained the age of twenty-one, and, according to his evidence, immediately thereupon his father, *Arthur Fane*, proposed to him that he should re-settle the lands comprised in the settlement, and as an inducement represented that, under the existing settlement he (*Arthur Fane*) was empowered to charge by way of portions for the children of his marriage, other than the Plaintiff, the sum of £5000, which would not be chargeable upon the lands unless he exercised the power, and he offered and promised to the Plaintiff that if he would make the proposed re-settlement he (*Arthur Fane*) would make other provision for his other children, and would not exercise, but would release, his alleged power, which, having regard to the income of the lands, would be a material advantage to the Plaintiff. The Plaintiff, under his father's influence and this inducement, then consented to make the proposed re-settlement, and a disentailing deed and re-settlement were accordingly prepared upon the father's instructions by the father's solicitor, who throughout the negotiations for and in carrying out the re-settlement acted as the adviser of the son, as well as the father, the former having no separate adviser.

The disentailing deed, which was dated the 7th of February, 1859, recited shortly the indenture of release of the 9th of November, 1833, referring thereto as a settlement executed subsequently to the marriage "in pursuance of articles entered into previously thereto;" but contained no other reference to such articles, and referred to the trusts of the term of 1000 years as "certain trusts for raising the sum of £5000 for the portions of the younger children of *L. H. Fane* by *Arthur Fane*, if the said *A. B. Lambert*, *John Benett*, the elder, *Arthur Fane*, and *Lucy Harriet*, his wife, or the survivor of them, should so direct." The operative part of the disentailing deed comprised the usual conveyance by the Plaintiff as tenant in tail in remainder with the concurrence of his

V.-C. H. 1875 FANE v. FANE.

father, *Arthur Fane*, as the protector of the settlement (without prejudice to his father's estate for life and to certain specified incumbrances), to a trustee to the use of the Plaintiff in fee.

The deed of re-settlement was dated the 8th of February, 1859, and its narrative recitals were similar to those in the disentailing deed, the trusts of the indenture of the 9th of November, 1833, with reference to the term of 1000 years, being recited as trusts, "in case the said *A. B. Lambert*, *J. Benett*, the elder, *Arthur Fane*, and *Lucy Harriet*, or the survivor, should so direct, to raise and levy the sum of £5000 for the portions of the younger children of the said *Lucy Harriet Fane* by *Arthur Fane*;" and it further contained an introductory recital that *Arthur Fane* and the Plaintiff were desirous that the hereditaments comprised in the disentailing deed should be settled to the uses and in manner thereinafter expressed, and that they had agreed to execute the assurance thereinafter contained. The deed then witnessed that in pursuance of this agreement and in consideration of the premises, and of a nominal consideration, *Arthur Fane* and the Plaintiff, according to their respective estates and interests, conveyed the lands (subject to the same incumbrances as those specified in the deed of the 9th of November, 1833), to trustees, their heirs and assigns, to the use and intent of confirming the life estate limited to *Arthur Fane* by the indenture of the 9th of November, 1833, with all powers and privileges annexed thereto or limited to him by the said indenture, "except the power of raising, or directing the raising of, the sum of £5000 for the portions of his younger children," if the lands should vest in the Plaintiff and his issue. And after the death of *Arthur Fane* the estates were limited to the use of the Plaintiff and his assigns for his life, without impeachment of waste, with remainder to the use of his first and other sons in tail male, with remainder to the use of his daughters as tenants in common in tail general, with cross remainders between the daughters, with remainder to the use of *Henry Arthur Fane*, the third son of *Arthur Fane*, for life, with similar remainders in tail male and tail general in favour of his sons and daughters respectively, with remainder to the use of such persons and in such manner as the survivor of *Arthur Fane* and the Plaintiff should by deed or will appoint, and in default to the

use of the Plaintiff, his heirs and assigns for ever. The deed then contained a joint power for *Arthur Fane* and the Plaintiff to raise a sum of money by way of mortgage; powers for the Plaintiff, and after his decease for *Henry Arthur Fane*, to charge jointures and to charge portions for younger children; and a release in the following terms:—"And in further pursuance of the said recited agreement the said *Arthur Fane* doth hereby if the said hereditaments and premises to be conveyed shall vest in possession in the said *E. D. V. Fane* and his issue under the limitations hereinbefore contained, but in no other case or event, release and yield up unto" (trustees) "their executors administrators and assigns the power of raising or directing the raising of the sum of £5000 for the portions of his younger children so given or limited to him as aforesaid by the said recited indenture of settlement to the intent and so that the same power may in such event alone and not otherwise be absolutely released and extinguished."

*Arthur Fane* died on the 11th of June, 1872, and the Plaintiff entered into possession of the settled lands. In August, 1872, the Plaintiff discovered that under the articles of the 25th of August, 1832, the sum of £5000 was an actual charge upon the settled lands, and the term of 1000 years a subsisting term in equity instead of being, as he supposed, a charge and term only to take effect in case his father should so direct. A suit of *Stanford* v. *Fane* (1873 S. No. 169) was then instituted by *Vere Fane Benett Stanford*, as one of the younger children of *Arthur Fane*, against the Plaintiff, *Henry Arthur Fane*, and the trustees of the 1000 years' term, in order to obtain a declaration that under the articles of 1832 the sum of £5000 was agreed and intended to be provided as portions for the younger children in the settlement to be executed in pursuance thereof; that the Plaintiff *Stanford* became under the settlement of the 9th of November, 1833, or at all events under the articles of the 25th of August, 1832, entitled to one-fifth part of such sum; that the term of 1000 years was limited for the purpose of raising that sum; that the indenture of settlement of the 9th of November, 1873 might be reformed so far as necessary for the purpose of effectuating its true intent, and for other incidental relief. This suit of *Stanford* v. *Fane* came to a hearing

V.-C. H. 1875 FANE v. FANE.

before the Vice-Chancellor Sir *Charles Hall* on the 9th of November, 1874, when His Honour made a decree in favour of Mr. *Stanford*, declaring that according to the intent and upon the true construction of the indenture of the 9th of November, 1833, the sum of £5000 became, upon the death of *Arthur Fane*, raiseable out of the estates comprised in the same indenture, under the trusts declared concerning the term of 1000 years thereby limited.

In the meantime, the Plaintiff had instituted this suit against *Henry Arthur Fane* and the trustee of the re-settlement, charging that the indentures of the 7th and 8th of February, 1859, were obtained from and executed by him under parental influence, by surprise, and without professional advice, and upon a material misrepresentation, and under a material mistake as to the power of his father to release the charge of £5000. And he prayed, by his bill, that the indentures of the 7th and 8th of February, 1859, or, at all events, that of the 8th of February, 1859, might be set aside and delivered up and be cancelled, and that directions might be given for vesting the estates in the Plaintiff.

This suit now came on for hearing, it being admitted that the misrepresentations of *Arthur Fane*, the father, were innocently made.

Mr. *Dickinson*, Q.C., and Mr. *J. Beaumont*, for the Plaintiff:—

This is the simple case of a re-settlement executed by a tenant in tail in remainder shortly after attaining full age, without independent advice, upon the faith of a representation by his father, the tenant for life, which, though innocently made, was untrue. In fact, as it turned out, the father gave up nothing, and the son got nothing, while giving up his estate tail in exchange for a life estate. Under these circumstances, the re-settlement, being founded on a mutual mistake, cannot stand, and the Plaintiff is entitled to have it set aside, although there was no fraud in the transaction: *Cooper* v. *Phibbs* (1). In that case Lord *Westbury* lays down that the maxim, "*Ignorantia juris haud excusat*," has no application when the word "*jus*" denotes private rights.

Mr. *Morgan*, Q.C., and Mr. *Vaughan Hawkins*, for the Defen-

(1) Law Rep. 2 H. L. 149, 170.

dants, argued the case on behalf of the unborn children who would take under the limitations of the re-settlement:—

This is a case of a family settlement, and to such cases the same principles must not be applied as to dealings between strangers. The mere exercise of the parental influence is no ground for setting aside family arrangements tending to the peace of the family and the avoiding of disputes, and the cases relating to the re-settlement of family estates, where the object is the preservation of the family property, are still stronger. Such re-settlements are favoured by the Court, and between father, tenant for life, and son, tenant in tail, barring the entail and re-settling the property, if the re-settlement is reasonable, neither apparent inadequacy of consideration nor want of professional advice in the son is sufficient ground for setting it aside: *Jenner* v. *Jenner* (1). *Hoghton* v. *Hoghton* (2) is the only case in which a bill of this sort has succeeded, but there, while a great part of the judgment of the Master of the Rolls is favourable to our contention, the grounds on which he set aside the settlement were that under it the father took direct benefits from the son, and that the settlement was not a reasonable one, nor properly explained to the son, neither of which considerations apply here.

Then as to the mistake with reference to the power of charging portions. That mistake was innocently made, and in the absence of fraud family re-settlements, being analogous to family arrangements, will be established, although founded on mistake: *Gordon* v. *Gordon* (3). The case of *Cooper* v. *Phibbs* (4) is distinguishable from and has no application to the present case.

Moreover, this is not the simple case of a settlement merely in consideration of the release of the charge. A mere supposition of a right is enough to support a family agreement: *Stapilton* v. *Stapilton* (5). Any particular part of the bargain is not the consideration itself. The main consideration is the family arrangement. And the failure of an item in the bargain is immaterial: *Stewart* v. *Stewart* (6). The Court will not, in cases of family

(1) 2 Giff. 232; 2 D. F. & J. 359.
(2) 15 Beav. 278.
(3) 3 Sw. 400–463.
(4) Law Rep. 2 H. L. 149.
(5) 1 Atk. 2; Tud. L. C. in Eq. 4th Ed. p. 824.
(6) 6 Cl. & F. 911.

(1) sc 6 Jur. N. S. 668. 1st 1314

V.-C. H. 1875 FANE v. FANE.

arrangement, inquire into or consider the quantum of the consideration if there is a sufficient motive for the re-settlement, and that motive may either be the maintenance of the family peace or the preservation of the family property in its natural succession: *Gordon* v. *Gordon* (1). If only, as is the case here, the settlement is fair and proper, then a mistake such as this is not sufficient ground for setting it aside: *Pullen* v. *Ready* (2).

SIR CHARLES HALL, V.C.:—

I should certainly not seek to disturb the course of the decisions as to re-settlements by father and son if I had the power (which I have not) to do so. They are not to be interfered with lightly, and the parental influence in reference to such re-settlements, where there is no other consideration or element in the case, is, I conceive, to be disregarded. Such must be taken to be the law: for the Court has thought such re-settlements desirable, and has favoured them; but every case must be looked at with reference to all the circumstances attending the re-settlement.

What you have in this case is this, that it was supposed that the property was subject to a sum of £5000, but only in the event of the father choosing to say it should be so subject; that he had therefore the means and power of bringing into settlement as part of the transaction of re-settlement the sum of £5000 by releasing his power to charge it. Whether a power of that kind was capable of being, or properly could be, used in any way to the advantage of the father for the purpose of obtaining a settlement to any extent in his own favour, is a question with which I do not mean to deal; but it is not to be overlooked that ordinarily such powers vested in a father cannot be made properly the subject of bargain with the son. It was supposed there was a power to him to charge portions in favour of younger children, while in fact portions were actually charged. The father made this representation: "I have got a power to charge portions in favour of my younger children, and will give that up if you will make a re-settlement." Ordinarily, as I have said, such powers are not capable of being used in such a way, and there are many cases familiar to counsel in

(1) 3 Sw. 400–463. (2) 2 Atk. 587; Tu. L. C. in Eq. 840.

which settlements have been set aside simply because the father has attempted to use powers of jointuring and charging portions as a means of obtaining benefits accruing to the father from the re-settlement.

Passing that by, however, what we have in this case is, that the son, a young man who of course knew nothing about settlements and the mode of dealing with property, acts through the adviser of his father. Ordinarily, in re-settlements, there is no fault to be found with that; but the adviser of the father, who thus becomes the adviser of both, must, under such circumstances, take great care that the true state and position of the title to the property is accurately represented to the son. And in reference to that, in this particular case the right course would have been, not only to have looked into the settlement, which represented the property as only subject to the charge if the power was exercised, but also to have looked into the articles upon which that settlement was founded. The result of that investigation might or might not have been to satisfy the solicitor that the £5000 was not in reality in the position in which the father, and apparently the father's solicitor also, supposed it to be. However, the father's solicitor acted upon the view that there was no question whatever of the father having this power, and that he could bring it into the re-settlement. It must be taken, therefore, that the adviser of the father, although acting in this transaction on behalf of the son also, represented to the young man just as much as he would have represented to the young man's adviser if he had had a separate adviser, that the father was in this position. That, in reality, was untrue. There was an incorrect representation made to the son, and, according to the son's evidence in this matter, that representation influenced him, and led him to make the re-settlement in question. And it is not a case of the son coming here simply with his own unsupported evidence, but the very instruments which are before the Court shew and prove to my satisfaction that his statement as to the false representation in that respect is correct. There can be no doubt whatever that the representation was made to the son as he alleges.

There being, then, that representation made to the son, it is said that although it was a mistake, yet, inasmuch as this is in the

V.-C. H. 1875 FANE v. FANE.

nature of a family settlement, and having regard to the cases with reference to compromises which are said to be a portion of the same class of cases, or to be cases to which the same considerations apply, the son is precluded from obtaining any relief in respect of the representation made to him. I do not understand the law to be so, and I think when the observations of Lord *Eldon* in *Gordon* v. *Gordon* (1) are referred to, those observations, far from supporting that contention, support a proposition of an entirely different character; that is to say, that if there is a mistake—if there is a representation made to the person about to effect a settlement which is untrue, although honestly and innocently made, still, that representation being made, the person who effects the re-settlement is entitled under those circumstances to come to this Court, and to have the re-settlement set aside upon the ground of mistake. Lord *Eldon* says (2), where he is dealing with the general question, and treating of the cases of *Stapilton* v. *Stapilton* (3), and *Cann* v. *Cann* (4):—"Of the cases which have been quoted, *Stapilton* v. *Stapilton*, and *Cann* v. *Cann*, there is no necessity for me to say more than that they fully establish a principle of which I can have no doubt, that where family agreements have been fairly entered into without concealment or imposition upon either side, with no suppression of what is true, or suggestion of what is false, then, although the parties may have greatly misunderstood their situation, and mistaken their rights, a Court of Equity will not disturb the quiet which is the consequence of that agreement; but when the transaction has been unfair, and founded upon falsehood and misrepresentation, a Court of Equity would have a very great difficulty in permitting such a contract to bind the parties."

Now, take the first part of that judgment, where he says, "with no suggestion of what is false." There was here a suggestion, and not merely a suggestion, but a positive statement in the instrument itself of that which was false, viz., a recital of the settlement expressly, clearly, and distinctly stating that the father had the power to charge this property with £5000, and was about to give up that power. Let us, however, apply to this

(1) 3 Sw. 400.
(2) Ibid. 463.
(3) 1 Atk. 2.
(4) 1 P. Wms. 723

case as nearly as we can what Lord *Eldon* says in the same report, and those observations will shew that an innocent statement of that which is untrue will not protect the transaction, even although it be a re-settlement between father and son. Lord *Eldon* there says (1): "My opinion is, that if *James Gordon*, prior to the agreement, knew that there had been a private ceremony of marriage, and, conscientiously believing that it was not a legal marriage, omitted to communicate the fact to his brother, the Plaintiff would be entitled to relief; on the principle that, though family agreements are to be supported, where there is no fraud or mistake on either side, or none to which the other party is accessory; yet where there is mistake, though innocent, and the other party is accessory to it, this Court will interpose." Here there was an innocent mistake; the father was, as I conceive, accessory by his solicitor to the mistake being made; and if that be so, this is a case in which, according to Lord *Eldon*, the Court will interfere. The general observations of Lord *Romilly* in *Hoghton* v. *Hoghton* certainly tend in the same direction, for he says in that case (2): "The rule to be drawn from these cases, which is perfectly consistent with the rule which prevails in the first class of cases to which I referred, may, I think, be thus stated: that if the settlement of the property be one in which the father acquires no benefit not already possessed by him, and if the settlement be a reasonable and proper one, the Court will support it, even though it may appear that some influence was exerted by him to induce the son to execute it; and provided also that there was no suppression of what is true, or suggestion of what is false. This is distinctly stated by Lord *Eldon* in *Gordon* v. *Gordon* as applied to family agreements, and will also apply to these cases of re-settlement: 'Although,' says he, 'the parties may have greatly misunderstood their situation, and mistaken their rights, a Court of Equity will not disturb the quiet which is the consequence of that agreement.'" Then Lord *Romilly* goes on to say, and this is his own statement, "But where there is a mistake, though innocent, and the other party is accessory to it, this Court will interfere. The point of this observation is, that the one is accessory to the mistake of the other."

(1) 3 Sw. 467.

(2) 15 Beav. 305, 306.

V.-C. H. 1875 FANE v. FANE.

Therefore, treating this as a case in which there is jurisdiction, by reason of the mistake, it appears to me that, under that plain head of equity, notwithstanding the general rule in favour of leaning towards supporting family settlements, the Plaintiff here is entitled to relief.

I may observe, further, that I am much struck with this point also, that the father did by the execution of this re-settlement obtain, as it seems to me, very substantial benefits. It is true that he gave up some of his rights. He gave up his right of charging portions, excepting that those portions are really not substantial things as regards the father's own interest, because those were only to be operative and to become charges upon the property after the son had come into possession, for I find an express clause in the re-settlement which provides for that. It is very odd that in this re-settlement I do not find that the father makes any provision for the son at all. He does not give the present annuity, which is usual. Then a number of limitations are struck out, which before existed under the old settlement. Only the issue of the two sons are provided for apparently by the limitations. There is, then, a joint power of appointment to the father, with an ultimate power of appointment to the survivor. If you look at the present state of things, there is no issue of either of the two sons for whose issue provision is made. It is quite on the cards that the father may be the survivor. It is a very substantial benefit which is acquired by that ultimate limitation, for it is a power exercisable immediately, though only taking effect in case he survives. The father could always say: I will not exercise that joint power of appointment given to us two, and I will take my chance therefore of thus acquiring the reversion. I have no doubt that the reversion of this estate in the market could be sold for a very considerable sum of money if it were offered for sale. That is not, however, the main ground upon which I rest my judgment. I think that, under all the circumstances, the Plaintiff is entitled to be relieved from this re-settlement.

Solicitors: Mr. *W. A. Day;* Messrs. *Farrer, Ouvry, & Co.*

## *In re* ORLEBAR'S SETTLEMENT TRUSTS.

V.-C. H.
1875
July 16.

*Settlement—Death of Tenant for Life "leaving a Child or Children"—Trust for "the Child or Children"—Death of Child after Twenty-one in lifetime of Tenant for Life—Vested Interest.*

By a settlement trustees were directed to hold trust funds upon trust to pay the income to *E. H.* for life, and after her death, "leaving a child or children," to transfer, pay, and make over the fund unto "all and every the child or children of the said *E. H.*, and the issue of such of the said children as might be then dead" (such issue to take the parent's share), equally between them if more than one, the shares of sons to be transferred and paid at the age of twenty-one, and the shares of daughters at that age or marriage. Five of the children of *E. H.* survived her, and attained twenty-one or married, and one son of hers attained twenty-one and died without issue in her lifetime:—

*Held*, that although the trust only took effect in case some one child survived *E. H.*, the contingency upon which the trust took effect was not to be imported into the constitution of the class who were to take under the trust, and that the son who attained twenty-one and died in the lifetime of the tenant for life without issue took, nevertheless, a vested interest in the fund.

## PETITION.

By an indenture dated the 12th of July, 1821, being a settlement executed in consideration of the marriage afterwards solemnized between *William Augustus Orlebar* and *Mary Caroline* his wife, trust funds were assigned to trustees upon trust to pay the income to *Mary Caroline Orlebar* during her life for her separate use, and after her death to set apart so much of the *corpus* as would produce the yearly sum of £600, and to pay that sum to *William Augustus Orlebar* during his life; and to hold the residue of the trust fund upon trust, in case there should be any children then living of the marriage, immediately after the death of *M. C. Orlebar* to assign, transfer, and make over the same among the children of *W. A.* and *M. C. Orlebar*, or the issue of any such of them as might be dead leaving issue, in such manner as *M. C. Orlebar* should appoint, and in default of appointment to transfer, pay, and make over the trust premises unto all and every the child and children of *W. A.* and *M. C. Orlebar*, and the issue of such of them as might be dead (such issue to take the parent's

V.-C. H. 1875

*In re* Orlebar's Settlement Trusts.

share), equally between them if more than one, and if there should be but one such child, then the whole to such only child, the shares of sons to be transferred to them at their respective ages of twenty-one, and the shares of daughters at their respective ages of twenty-one or days of marriage, which should first happen after the death of *M. C. Orlebar*. And it was thereby provided that in default of appointment, in case any such child or children being a son or sons should attain the age of twenty-one years, or being a daughter or daughters should attain that age or marry in the lifetime of *M. C. Orlebar*, then and from thenceforth his or her interest in the trust premises should be a vested interest, and should be transmissible as such to his, her, and their issue, notwithstanding the death of such child or children afterwards in the lifetime of *M. C. Orlebar*. And after a clause providing that if any such child being a son should die under the age of twenty-one, and without leaving issue at his death, or being a daughter should die under that age and unmarried, then the share provided for such son or daughter should accrue to the survivor or survivors and other or others of the same children, and the issue of such of them as might be dead having first acquired a vested interest in their respective original shares, to be equally divided between them, it was provided that in default of children of the marriage (which event happened) the trustees should, after the death of the said *M. C. Orlebar* (and subject to the payment of the said annual sum of £600 to the said *W. A. Orlebar* during his life) hold the trust fund upon trust to pay the annual proceeds thereof unto *Elizabeth Hancock* and *Maria Orlebar* (two of the sisters of *M. C. Orlebar*) during their respective lives in equal shares for their separate use, "and after the decease of either of them leaving a child or children, then as to one moiety of the whole of the trust premises, upon trust to assign, transfer, pay, and make over the same unto, between, and among such one or more of the children of the said *Elizabeth Hancock* and *Maria Orlebar*, who should first happen to depart this life, or the issue of such children as might be then dead leaving issue living at his or their death, or born in due time afterwards, at such age" and in such manner as the said *Mary Caroline Orlebar* should by deed or will appoint, and in default of appointment then upon

further trust to transfer, pay, and make over the said moiety whereof there should be no such appointment "unto all and every the child or children of the said *Elizabeth Hancock* or *Maria Orlebar*, who should first happen to depart this life, and the issue of such of their said children as might be then dead (such issue to take the share of his or her parent), equally between and among them (if more than one), share and share alike, and if there should happen to be but one such child, then the whole to such only child, the share or shares of such of them as should be a son or sons to be transferred and paid to him or them at his or their age or respective ages of twenty-one years, and the share or shares of such of them as should be a daughter or daughters to be transferred and paid to her or them at her or their age or respective ages of twenty-one years or days of marriage, which should first happen. And it was thereby declared that if any such child being a son should die under the age of twenty-one years without leaving lawful issue, and if any such child being a daughter should die under that age and unmarried," then in default of and subject to any appointment, the share of each such son or daughter so dying should "accrue to the survivor or survivors, and other or others of the same children, and the issue of such of them as might be dead, having first acquired a vested interest in their respective original shares thereof, and be equally divided between such survivors or others of them, and the issue of such of them as might be dead as aforesaid (if more than one), share and share alike, and the same should become vested, and transferable, and payable at such respective ages, days, and times as were thereby provided and declared touching his, her, or their original share or shares, and that such benefit of survivorship or accruer should extend as well to the surviving or accruing as to the original shares. And from and immediately after the decease of the survivor of them the said *Elizabeth Hancock* and *Maria Orlebar* leaving a child or children, or the issue of any such child or children living at her death," the trustees were directed to stand possessed of the other moiety of the trust premises upon trusts for the benefit of the child, children, or issue of the survivor of *Elizabeth Hancock* and *Maria Orlebar* similar to those declared concerning the first moiety thereof. And it was declared that if

V.-C. H. 1875 *In re* Orlebar's Settlement Trusts.

either of them the said *Elizabeth Hancock* and *Maria Orlebar* should die without leaving any child or children or any issue of such child or children who should live to attain a vested interest in the fund in manner thereinbefore mentioned, then the trustees were thereby directed to stand possessed of the annual proceeds of such moiety of the fund of her whose issue should so fail in manner aforesaid for the benefit of the survivor of them the said *Elizabeth Hancock* and *Maria Orlebar* during her life, and after the decease of such survivor to stand possessed of the principal thereof for the benefit of the child or children of such survivor and his, her, or their issue upon the same trusts as were thereinbefore declared concerning the first-mentioned moiety of the trust fund.

There was no issue of the marriage of *W. A.* and *M. C. Orlebar*, and they were both dead, *M. C. Orlebar* having died in March, 1859.

*Elizabeth Hancock* died on the 17th of November, 1861, leaving *Maria Orlebar* her surviving, and having had six children, viz., the five Petitioners, all of whom had attained twenty-one, or, being daughters, had married, and one son, who had died in her lifetime. The deceased son, Major *Fitzharding William Louquet Hancock*, attained twenty-one, and died on the 26th of January, 1858, without issue, having by his will bequeathed all his personal estate to his widow, and appointed her sole executrix.

Mrs. *M. C. Orlebar* had exercised her power of appointment in respect of a portion of the moiety settled on Mrs. *Hancock* and her children; and the surviving trustee of the settlement having paid into Court, under the *Trustee Relief Act*, a sum of £662 11*s.* 9*d.*, as representing the share to which Major *Hancock* would have been entitled in the unappointed residue in case he had been living at the death of his mother, this Petition was presented by his five surviving brothers and sisters for payment out to them of the sum paid in, in order to raise the question whether it was divisible amongst them, or passed to his legal personal representative.

Mr. *Morgan*, Q.C., and Mr. *E. Beaumont*, for the Petitioners:—

The limitations of the settlement expressly provide, in the case

of the children of the marriage of Mr. and Mrs. *Orlebar*, that in default of appointment every child attaining twenty-one, or being a daughter marrying, shall take a vested interest in the trust fund, notwithstanding his or her death in the lifetime of Mrs. *Orlebar*, the tenant for life; but there is no such provision as to a child of Mrs. *Hancock* attaining twenty-one, and dying in her lifetime.

This is not a case in which the word "leaving" can be construed as "having," or "having had." By the terms of the settlement the limitations in favour of Mrs. *Hancock's* children cannot take effect unless she dies leaving children living at her death, and the whole disposition imports contingency as to the objects to take. The case is within the authority of *Bythesea* v. *Bythesea* (1), although that case goes further, inasmuch as in it there was actually an express declaration as to vesting at twenty-one, which here is only to be found with regard to the settlor's children.

*Woodcock* v. *Duke of Dorset* (2), which was referred to in *Bythesea* v. *Bythesea*, is distinguishable from the present case. The limitations of the settlement in *Woodcock* v. *Duke of Dorset* are not correctly given in the report of that case in 3 *Brown*, but will be found in a note to *Howgrave* v. *Cartier* (3), the actual words being to "the children," not to "such child or children," and there the event was answered by the survivor leaving one child living; and, moreover, there was no provision, as in this case, for the issue of a child who dies in the lifetime of the tenant for life. These distinctions make *Woodcock* v. *Duke of Dorset* an authority in our favour. If this were the case of a will, it is clear that no child predeceasing the parent could take: *Bythesea* v. *Bythesea*; *Wilson* v. *Mount* (4); *Sheffield* v. *Kennett* (5); *In re Watson's Trusts* (6); and precisely the same principles apply. The condition that each child must outlive the tenant for life is part of the gift itself. The recent case of *Jeyes* v. *Savage* (7), which arose upon a settlement the terms of which are similar in many respects to this, is also an authority in our favour.

It is also observable in this case, that when the settlors are

(1) 23 L. J. (Ch.) 1004. (4) 19 Beav. 292.
(2) 3 Bro. C. C. 569. (5) 27 Beav. 207; 4 De G. & J. 593.
(3) 3 V. & B. 79. (6) Law Rep. 10 Eq. 36.
(7) Law Rep. 10 Ch. 555.

V.-C. H. 1875 *In re* Orlebar's Settlement Trusts.

providing for their own children they are careful to insert a provision to meet the contingency which has happened in the case of the sister's children, although the construction would have been stretched in favour of their own children, while they omit to insert the provision in the case of the children of collaterals, in whose favour the construction would not be stretched. Again, there is no trust for the children of Mrs. *Hancock* distinct from the direction to pay, and the fact that the settlors have expressly provided for the issue of a child dying in the lifetime of a tenant for life shews that they did not contemplate that a child so dying would have taken a vested interest, for had he done so he would have been able himself to make provision for his own children. Therefore, upon authority, and upon the construction of the whole settlement, no child of Mrs. *Hancock* took a vested interest unless he or she survived Mrs. *Hancock*, and attained twenty-one or married, and Major *Hancock* having died in her lifetime, can take no share in the unappointed residue.

Mr. *Greene*, Q.C., and Mr. *Kingdon*, for the legal personal representatives of Major *Hancock*, and Mr. *Franklen*, for the surviving trustee of the settlement, were not called upon.

Sir Charles Hall, V.C.:—

I think that I must construe this instrument according to what I take to be the actual meaning of the words used in the trust for children; that is to say, as a trust in favour of "all and every the child or children of the said *Elizabeth Hancock* and the issue of such of their said children as might be then dead." The words are "unto all and every the child or children of *Elizabeth Hancock*," with a substitution of issue for such as might be dead; and the words "all and every the child or children," as I construe them, include all the children and not merely those who survive the tenant for life; and the fact of any children or issue taking being made dependent on the fact of some one child surviving, is not, in my judgment, according to the language of the instrument, or according to authority, sufficient to cut down the objects to take to those alone who are mentioned as being only to take provided one object survives; in other words, that the con-

tingency upon which the gift is to take effect is not to be imported into the constitution of the class who are to take under the trust itself.

The argument is specious and ingenious, and has been very ably pressed, that because there is a provision for the issue of children the Court is to put a different construction upon the trust in favour of the children to that which it would otherwise bear. If we had to make a new trust there might be a great deal to be said for that, no doubt; but I cannot, by reason of those provisions for the issue, or by reason of contrasting this set of trusts with another set of trusts, in which there is an express provision as to the vesting in children, which was no doubt inserted from an anxiety to provide unquestionably and clearly for the offspring of the intended marriage—I cannot for these reasons vary and alter the construction of the trust for the children which occurs in the first part of these trusts which are under consideration.

The authorities which have been referred to in support of the contention that children must survive in order to take—in other words, that inasmuch as one child must survive in order that any of the children may take, therefore all the children must survive, or otherwise they cannot take—do not, in my opinion, oblige me to hold that to be the true construction. The case of *Bythesea* v. *Bythesea* (1), looking at it on the whole, was, I consider, a case in which the Court was pressed to construe the instrument with reference to the case of *Woodcock* v. *Duke of Dorset* (2) and cases of that class. It was thought that those cases did not govern *Bythesea* v. *Bythesea*, nor do I hold that those authorities govern the case now before me. But in that case there ran through the whole of the trust, as I read it, words which confined the class to take to those or one of those who were specified in the words introducing the trusts for the children; in other words, that everywhere throughout it was stated that it was to be "such" children who were to take.

The case before the Master of the Rolls of *Wilson* v. *Mount* (3) is certainly not open to the same observation. The Master of the Rolls in giving judgment in that case does not appear to have referred to the particular trust in which the word "such" did not

(1) 23 L. J. (Ch.) 1004. (2) 3 Bro. C. C. 569.
(3) 19 Beav. 292.

V.-C. H. 1875

*In re* ORLEBAR'S SETTLEMENT TRUSTS.

occur, and his judgment depends upon the occurrence of this word "such" throughout, and the whole reasoning proceeded upon that.

The authority which ought to govern the present case is, in my opinion, *Boulton* v. *Beard* (1). That case was heard before the Lord Justice *Knight Bruce* and Lord Justice *Turner*. The Lord Justice *Knight Bruce*, as we all know, always leant towards vesting in all these cases, and brought some cases within the influence of *Woodcock* v. *Duke of Dorset* (2), and cases of that class, which apparently, having regard to the decision of the Lords Justices in *Jeyes* v. *Savage* (3), will probably not hereafter be considered as within the range of those decisions. The case of *Boulton* v. *Beard*, I observe, was decided about a year and a half before the decision in *Bythesea* v. *Bythesea* (4), and I cannot suppose that Lord Justice *Turner*, in deciding *Bythesea* v. *Bythesea*, meant to depart from the judgment he had given in *Boulton* v. *Beard* about a year and a half before.

The trusts in *Boulton* v. *Beard* were trusts of one-tenth to or for the use of *R. H.*, and another one-tenth to or for the use of *C. R.*, for their respective lives; and in case either of them should die in the lifetime of the tenant for life, or afterwards, leaving lawful issue, then the testatrix directed that the part of him or her so dying leaving lawful issue should go and be equally divided among his or her children as they should attain twenty-one. And it was held that a child of *C. R.* who survived the tenant for life and attained twenty-one, but died in the lifetime of *C. R.*, took a vested interest. What Lord Justice *Knight Bruce* said in his judgment was this (5): "The question is, whether a child of *Catherine Rayner*, who, after the testatrix's death, died in the lifetime of *Catherine Rayner*, having attained twenty-one, took a vested interest in the part of the share of the residuary estate of which *Catherine Rayner* was tenant for life. Upon this question no doubt could have arisen if the case had simply been one of a gift to *Catherine Rayner* for life, and after her death in the language of the will, omitting the condition of *Catherine Rayner* leaving lawful issue. Would the case be varied if by a separate clause the testatrix had declared that if *Catherine Rayner* should

(1) 3 D. M. & G. 608.
(2) 3 Bro. C. C. 569.
(3) Law Rep. 10 Ch. 555.
(4) 23 L. J. (Ch.) 1004.
(5) 3 D. M. & G. 611.

die without leaving issue her share should fall into the residue, or go as in case of intestacy? No one will argue that this would have caused a difference. We should be making a will, and guessing away what is plain, if we acceded to the argument addressed to us on behalf of the defendant." The question had been previously decided by the Master of the Rolls in the same way, and Lord Justice *Turner*, in the course of his judgment, said (1): "I concur entirely with the construction which the Master of the Rolls has put upon this will. The first argument in support of a different construction is, that the bequest to the children of *Catherine Rayner* being only given in the contingent event of her leaving issue, therefore only the children who were living when the contingency happened would take. That argument would go to a great extent, and affect many decisions, affirming, as it must, the principle that where there is a gift to a class upon a contingent event, the time of the happening of the contingency determines the individuals composing the class. That is not the rule. Another argument was, that there is no bequest except in the direction to pay. But Sir *James Wigram* has well laid down the rule with reference to questions of this description in *Bull* v. *Pritchard* (2). He there says, 'There are two classes of cases, under one or the other of which the present case must fall. One class is where the devise is to a party at a given age, and the property is given over if the devisee dies under that age. The other is where the description of the devisee is such as to make the given age part of that description. In cases of the former class the Court has discovered an intention expressed in the will that the first devisee shall take all that the testator has to give except what he has given to the devisee over; and in order to give effect to that intention has held, by force of the language of the will, that the first devise was not contingent, but vested, subject to be divested upon the happening of the event upon which the property is given over: *Phipps* v. *Akers* (3). In the second class, the Court has held the devise contingent, upon the ground that no one could claim who could not predicate of himself that he was of the age required—that otherwise he did not answer the entire description': *Festing* v.

(1) 3 D. M. & G. 612. (2) 5 Hare, 567, 571.
(3) 9 Cl. & F. 583; 4 Man. & G. 1107; 3 Cl. & F. 733.

V.-C. H. 1875

*In re* Orlebar's Settlement Trusts.

*Allen* (1)." In this case the gift to the children, in the event of the parent leaving issue, is absolute upon their attaining twenty-one, and the description of the children who are to take is not qualified. Nor is there anything in the fact of there being a gift over, as in the present case; it is only a provision for a particular event.

Another case in favour of this view is *M'Lachlan* v. *Taitt* (2); there there was a gift to two persons, *E. A.* and *S. G.*, for their lives, and if either should die without leaving issue upon trust for the survivor for life; but if either should die leaving issue, then one moiety to the children of *E. A.*, and one moiety to the children of *S. G.*, "and to their respective heirs, executors, and assigns as tenants in common, the said children to become beneficially interested on the death of their respective parents." There it was held, affirming the decision of the Master of the Rolls, that the children of *E. A.* and *S. G.* acquired vested interests respectively on their births, and not upon the death of their respective parents. That is to say, that although it was only a gift to them if the parent should die leaving issue, that still all were entitled to take, whether they survived their own parent or not, if any one survived the parent. That appears to me to be the present case. There is a trust for the children, although upon a contingency that some one child should survive. I therefore take the words as I find them.

I think the reasoning upon the subject of the provision for the issue, and the other arguments founded upon the context, are not sufficient to outweigh what is the plain interpretation of the trust for the children. All beyond is speculative, and insufficient to take away and detract from the clear meaning of the words of the trust for the children. Therefore there must be a declaration to that effect.

Solicitors: Messrs. *Shepheard & Sons;* Messrs. *Baker, Folder, & Upperton;* Messrs. *Iliffe, Russell, & Iliffe.*

(1) 5 Hare, 573. (2) 30 L. J. (Ch.) 276.

## WATSON *v.* WOODMAN.

V.-C. H.
1875
July 24.

[1872 W. 191.]

*Partnership, Dissolution of—Debt due from Solicitors and General Agents to Client—Part payment by continuing Partner—Statutes of Limitation—Express Trust—Mercantile Law Amendment Act*, 1856.

After a dissolution of partnership, by which the continuing partner covenanted *inter alia* to pay the debts and to pay the retiring partner a sum equal to half the next half-year's profits :—

*Held*, that part-payment of a debt by the continuing partner during the said half-year could not be set up against the retiring partner as an answer to the *Statutes of Limitation*:

*Held*, also, that though the debt was from solicitors to a client in respect of moneys received, there was no express trust to exclude the operation of the statutes.

*WILLIAM J. P. WATSON*, who died on the 29th of December, 1870, by his will, dated the 19th of November, 1869, after appointing the Defendants *Edward T. Row* and *Benjamin Woodman* trustees and executors thereof, devised and bequeathed to his brother *Robert Watson* (the Plaintiff) for life all his real and personal estate, and after his death to the use of his first and other sons in tail male, with remainder to the use of all his daughters as tenants in common, with remainder to the use of his (the testator's) right heirs. The testator directed that *Benjamin Woodman* should, notwithstanding his being a trustee, be entitled to charge for all professional business done by him with reference to the trusts of the will.

The Defendants *William Woodman* and *Benjamin Woodman* carried on business in partnership as attorneys and solicitors at *Morpeth* from the year 1857 to the 1st of June, 1866. For several years prior and down to the 1st of June, 1866, *William* and *Benjamin Woodman* were employed by the testator as his solicitors and general agents, and from that date *Benjamin Woodman* continued to be so employed by and to act for the testator down to his death. In the course and as part of such employment *William* and *Benjamin Woodman* received divers large sums of money on account of the testator, to be held by them for him and to be applied as he should from time to time direct, and in par-

V.-C. H. 1875 WATSON v. WOODMAN.

ticular they on the 18th of November, 1865, received for him a sum of £5000, which the testator had borrowed on mortgage from the *Equitable Reversionary Loan Investment Society*, and in that and the following month they received for him other sums, amounting in the aggregate to upwards of £1032, from divers persons. They made payments out of the moneys so received by them to and by the direction of the testator, by means of which, and of the retention of a sum of £210 10*s.* for costs, the moneys in their hands in respect of such sums were reduced to the sum of £1590 12*s.* 5*d.* The last payment in respect of such sums was made by a cheque for £300 drawn by *Benjamin Woodman* in favour of the testator on the 20th of July, 1866, and paid by the bankers of *Benjamin*, out of moneys standing to his credit, on the following day. This bill was filed on the 20th of July, 1872, for an account of all dealings and transactions of *William Woodman* and *Benjamin Woodman*, as solicitors and agents of the testator, down to the 1st of June, 1866, and of all moneys received by them respectively for or on his account down to that date, and of the application thereof, and for payment of what might be found due from them.

By an indenture dated the 1st of June, 1866, expressed to be made between *William Woodman* of the one part and *Benjamin Woodman* of the other part, after reciting the articles of partnership dated the 1st of January, 1857, for twenty-one years, that it had been agreed that *William Woodman* should retire from the profession of attorney and solicitor, and that the partnership should be dissolved upon the terms therein contained, it was witnessed that, in pursuance of the agreement and in consideration of the covenants therein contained, they did mutually dissolve and determine the partnership from that date, and did release each other from all the covenants and provisions of the indenture of partnership. It was agreed between them that all the office furniture, law and other books, and all papers, and also the goodwill of the business, should become the exclusive property of *Benjamin*, and that all the credits and book debts of the partnership should with all convenient speed be collected and got in by him; and he should in the first place thereout pay and discharge all debts and liabilities owing or incurred by him and *William Woodman* in

respect of the partnership, and should pay to *William Woodman* such sum of money as should be due to him under the indenture of 1857, and should retain the residue for his own benefit; and *Benjamin Woodman* expressly agreed that either out of the credits and book debts, or out of his own proper moneys, all the debts and liabilities owing or incurred by the partnership should be paid and discharged before the 31st of December, 1866.

*Benjamin Woodman* covenanted that he would, on or before the 1st of March, 1867, pay *William* all such sums of money as should be due to him under the indenture of 1857, and also a sum equivalent to one moiety of the net profits made by him in carrying on the business and matters before carried on by the partnership between the 1st of June, 1866, and the 31st of December, 1866; and also that all the debts and moneys appearing to be due and owing to the partnership by the books thereof, as well as all moneys to become due before the 31st December, 1866, for the business to be carried on by *Benjamin*, should be guaranteed by him and accounted for in full; and further, that *Benjamin* would, as from the 1st of January, 1867, during the joint lives of himself and *William*, pay to *William*, or his assigns, the yearly sum of £500 by equal quarterly payments; the first payment to be made on the 1st of April, 1867, if *William* should be then living; that if *Benjamin* should survive *William* he would, during the term of five years from the death of *William*, if *Benjamin* should so long live, pay *William's* executors the yearly sum of £200 by equal quarterly payments; and that during the life of *William*, *Benjamin* should take no partner without the consent in writing of *William*, and that before any person should become a partner with *Benjamin*, either during the life of *William* or within five years after his death, such person should enter into a covenant with *William*, his executors, or administrators, for the performance of all such covenants therein contained on the part of *Benjamin* as should be then unfulfilled; and also, that in the event of the death of *Benjamin* no person should be entitled to the papers and goodwill of the business, either of the partners or of *Benjamin* solely, without the like consent, and in like manner entering into such covenant; and that in the event of *Thomas Benjamin Woodman*, son of *William*, and then an articled

V.-C. H. 1875 WATSON v. WOODMAN.

clerk with the parties, being admitted as an attorney and solicitor within twelve months after the expiration of his articles, he should be admitted to one-fourth share of the business for three years, and then to one-third share, provided *William*, if living, should give up one-third of his yearly sum of £500; but that covenant was in no way to affect the yearly sum of £200; and further, that *William*, his executors, &c., should have a lien or charge on *Benjamin's* share of the credits and book debts of the partnership, and also on the future credits and book debts of *Benjamin*, in respect of the business carried on by him, for the annuities and other moneys covenanted to be paid by him; and also that *William* should at all times have free access to all the books, deeds, and papers then belonging to or in the possession of the parties thereto as partners.

By an indenture dated the 18th of April, 1867, made between *William Woodman* (described as of *Morpeth*, attorney and solicitor) of the one part, and *Benjamin Woodman* of the other part, after reciting the partnership indenture of January, 1857, and the indenture of the 1st of June, 1866, and that upon taking the accounts of the partnership it had been found that *Benjamin* had drawn out of the assets for his own use to the 1st of June, 1866, sums in excess of his share of the profits; that *William* had left in the partnership sums which had become due to him on account of his share of the profits; that the debts and moneys appearing to be due and owing to the partnership on the 1st of June, 1866, had been found to have been to a great extent already received by *Benjamin*, or to be irrecoverable, and that there would arise on that account a large deficiency; that it had been found that the debts and liabilities owing by the partnership on the 1st of June, 1866, exceeded the amount then appearing by the books; and that *Benjamin*, having been wholly unable out of his own moneys to discharge, before the 31st of December, 1866, such debts and liabilities, and the assets of the partnership being wholly insufficient to discharge the same, *Benjamin* had applied to *William* to discharge such of the same as were required and proper to be discharged out of his moneys, which he had agreed to do upon having certain alterations of the provisions of the deed of June, 1866, made, and such additional security for the payment of the sums due and to become

due from *Benjamin* on the partnership account, and under the deed of June, 1866, as was therein contained; and after reciting that, under the circumstances therein appearing, *Benjamin* was bound to pay to *William*, upon the partnership account, the sum of £3679 18*s.* 2*d.*; that the annuity to *William* was wholly in arrear; and that *William* had advanced to *Benjamin*, since the 1st of June, 1866, sums to enable him to carry on the business amounting to £630, and that *William* had made further payments out of his own moneys, in respect of the partnership liabilities, amounting to £544 17*s.* 2*d.*, and it was apprehended that it would be necessary for him to make further payments on the said account, and to make to *Benjamin* further advances for the purpose of carrying on his business. *Benjamin* covenanted with *William* to pay on demand to him, his executors, &c., the sum of £4309 18*s.* 2*d.*, with interest at £4 per cent., and also all further moneys which might be found to be due from him to *William* on the partnership account, and under the deed of June, 1866; and it was agreed that in the event of breach by *Benjamin* of any of the covenants, all the office furniture, books, and papers belonging to the partnership should not be the property of *Benjamin*, but the exclusive property of *William;* that the goodwill of the business carried on by the partnership should not be the property of *Benjamin*, but should be the exclusive property of *William*, and that *William* should be at liberty to carry on the business of an attorney and solicitor at *Morpeth* as from the 25th of December, 1866. *Benjamin* undertook to keep proper books of account, and to allow *William* to have access to them; and there were stipulations that *Benjamin* should not sell his business, or any interest therein, without *William's* consent in writing; that *William* might, in case of breach by *Benjamin* of any of his covenants, sell the whole or any part of the business carried on by *Benjamin*, and receive the purchase-money for the same, and that nothing therein contained should extend or be construed to extend to constitute *William* a partner with *Benjamin* in his business, or to make him liable to other persons for any liabilities to be incurred by *Benjamin* in carrying on the business. Since the execution of the deed of April, 1867, *William* had carried on business as an attorney and solicitor at *Morpeth*. *Benjamin* made default in payment to *Wil-*

V.-C. H. 1875 WATSON v. WOODMAN.

*liam* of the moneys covenanted to be paid to him, and thereupon *William* claimed to be entitled to the office furniture and all the books and papers belonging to the partnership on the 1st of June, 1866, and attempted to take possession; but *Benjamin* disputed the right of *William* to do so, and an arrangement was come to between them, which was carried out by a deed dated the 24th of December, 1870, and by which, after reciting in effect the three previous deeds of January, 1857, June, 1866, and April, 1867, and *inter alia*, that there were certain sums due by *Benjamin* to *William*, and that *Benjamin* had not performed his covenants, *Benjamin* covenanted with *William* that he would pay and discharge all debts and accounts (if any) then due or owing, or which might become due or owing, in any manner for or on account of the partnership, and also that he would indemnify *William* for all such partnership debts and accounts.

*Benjamin Woodman*, who had died since the institution of the suit, by his answer stated that *William Woodman* and himself, from the 29th of December, 1863, down to the dissolution of the partnership (*i.e.*, about two years and five months), acted as the solicitors and as the general agents or as agents of the testator, and during that period they received and (including a payment of a sum of £300 made on the 20th of July, 1866, which was a payment made on account of the firm) they paid on his account several sums of money mentioned in an account set forth in a schedule to the answer; and that it was the fact that, at the death of the testator, the sum of £1590 12*s.* 5*d.*, and no more, remained due and owing to him from them on account of the partnership debt, and that the same still remained due and owing to the estate of the testator from *William Woodman* and himself.

In the pleadings a letter, written on the 6th of April, 1872, by *William Woodman* to his solicitor at that time, was set forth. It and the evidence in the cause are sufficiently referred to in the judgment.

Mr. *Dickinson*, Q.C., and Mr. *Kekewich*, for the Plaintiff:—

First: Under the course of dealing between the testator and the firm an express trust was created of the moneys received by *B.* and *W. Woodman*, and the Statutes of Limitations are excluded:

*Burdick* v. *Garrick* (1). Secondly: The payment by *Benjamin* of £300 on the 21st of July, 1866, was a payment on behalf of himself and *William*, as appears from the entire transaction: *Watson* v. *Pears* (2); *Robinson* v. *Waddington* (3); *Reg.* v. *Justices of Derbyshire* (4); *Fisher's Harrison's* Digest (5); *Winter* v. *Innes* (6); *Way* v. *Bassett* (7); *Lindley* on Partnership (8). Lastly: The partnership was not really dissolved till December, 1866, for *William* retained his profits to that date; and it follows that the payment was on account of both partners, and is an answer to the statute.

They also referred to *Lindley* on Partnership (9); *Clayton's Case* (10); *Simson* v. *Ingham* (11); *Mills* v. *Fowkes* (12); *City Discount Company* v. *McLean* (13), and submitted that they did not govern this case, as here there was not a continuing account after the payment of the £300.

Mr. *Methold*, for Miss *Watson*, interested under the will of the testator in remainder, supported the Plaintiff's case.

Mr. *Cotton*, Q.C., and Mr. *Chisholm Batten*, for the Defendant, *William Woodman*:—

The Statutes of Limitation (21 Jac. 1, c. 16, s. 3; 3 & 4 Will. 4, c. 42, s. 3; 16 & 17 Vict. c. 113, s. 20) are an answer to this claim, and a complete bar in respect of any balance due to the testator on the 1st of June, 1866. We also rely upon the 14th section of the *Mercantile Law Amendment Act*, 1856, which enacts, in reference to those statutes, that when there are two or more co-contractors or co-debtors, whether bound or liable jointly only, or jointly and severally, or executors or administrators of any contractor, no such co-contractor or co-debtor, executor, or administrator, shall lose the benefit of the said enactments, or any of them, so as to be chargeable in respect or by reason only of payment of any principal, interest, or other money, by any other or

(1) Law. Rep. 5 Ch. 233.
(2) 2 Camp. 294.
(3) 13 Q. B. 753.
(4) 7 Ibid. 193.
(5) Vol. iv. 8322, *et seq.*
(6) 4 My. & Cr. 101.
(7) 5 Hare, 55.
(8) 3rd Ed. 473, note 476.
(9) Vol. i. p. 442.
(10) 1 Mer. 608.
(11) 2 B. & C. 65.
(12) 5 Bing. N. C. 455.
(13) Law Rep. 9 C. P. 692–699.

V.-C H. 1875 WATSON v. WOODMAN.

others of such co-contractors or co-debtors, executors, or administrators. Looking at the state of the law as it existed before 1856, and at the alteration made in it by that Act, the payment of the £300 cannot be considered as a payment made by *William Woodman*, or as a payment made by *Benjamin* as the agent of *William*. The observation in Mr. *Lindley's* book is the only thing that could be relied upon for the Plaintiff.

*Burdick* v. *Garrick* (1) was quite distinct from the present case, as that was one of a power of attorney to sell property, and to invest the proceeds. There was really no fiduciary relation between the parties, as is shewn by the decisions in *Blair* v. *Bromley* (2), *In re Hindmarsh* (3), and *Foley* v. *Hill* (4). The same doctrine is applicable to bankers and solicitors, as it is a very common thing for solicitors to act as *quasi* bankers. Co-contractors of every kind are within the statute, and part payment is not sufficient to take a debt out of it, unless it can be inferred that it amounted to an implied promise to pay the residue of the debt: *Jackson* v. *Woolley* (5); *Tanner* v. *Smart* (6); *Morgan* v. *Rowlands* (7).

[They also referred to *Rolfe* v. *Flower* (8).]

Mr. *Cozens-Hardy* appeared for the Defendant *Row*, and asked for his costs as against the Plaintiff.

Mr. *Dickinson*, in reply.

SIR CHARLES HALL, V.C.:—

*William J. P. Watson*, deceased, who, for the purposes of this suit, must be taken to be duly represented by the Plaintiff, and who may be conveniently referred to as the testator, was a client of a firm of solicitors consisting of *William Woodman* and his son *Benjamin Woodman*. The firm received moneys on account of the testator, and was, when the firm dissolved partnership, which it did on the 1st of June, 1866, indebted to the testator in respect of such moneys in a considerable sum.

(1) Law Rep. 5 Ch. 233.
(2) 2 Ph. 354.
(3) 1 Dr. & Sm. 129.
(4) 2 H. L. C. 28.
(5) 8 E. & B. 778.
(6) 6 B. & C. 603.
(7) Law Rep. 7 Q. B. 493–498.
(8) Ibid. 1 P. C. 27–44.

[The Vice-Chancellor referred to the provisions of the indenture of dissolution of partnership, and continued:—]

The two partners subsequently altered their arrangements, and in reference thereto two other deeds, dated in April, 1867, and December, 1870, were executed. By the deed of 1867 it was, in effect, stated, amongst other things not important for the purposes of this suit, that the partnership assets were insufficient to pay the partnership liabilities, that *Benjamin* had not been able to pay them out of his moneys, that *William* had made large advances for that purpose, and that it was apprehended it would be necessary for him to make further payments on that account.

The Plaintiff has contended that the arrangement in June, 1866, was such as not to amount to a complete dissolution of the partnership; and further, that the two partners acted so as that for the purposes of this suit they should be deemed to have continued partners; but it appears to me that there was a complete dissolution of partnership, at least as regards any right of *Benjamin* to do anything to the detriment of *William* in reference to the then existing debts and liabilities of the partnership, and I do not think it is made out that the two parties have so acted that they should for the purposes of this suit be deemed to have continued partners. The Plaintiff seeks in this suit to recover from *William* the sum owing from the firm to the testator, as I have before stated, less a sum of £300 paid as afterwards mentioned. *William* relies on the Statutes of Limitation as a bar to the Plaintiff's claim. To take the case out of the statutes, the Plaintiff relies on a payment of £300 made by *Benjamin* on the 21st of July, 1866. *William* says that such payment does not take the case out of the statutes. He says that sect. 14 of the *Mercantile Law Amendment Act*, 1856, applies, and that *Benjamin* after the dissolution could not deprive his co-debtor (*William*) of the benefit of that statute. There was an endeavour on the part of the Plaintiff to meet this contention of *William* by the argument that the payment of the £300 ought to be deemed to be a payment by the two partners, although made by the hand of *Benjamin*, and that the position of *Benjamin* under the provisions of the deed of 1866, taken in connection with the statement in *Benjamin's* answer, sup-

V.-C. H. 1875 WATSON v. WOODMAN.

ported such contention. It appears to me that this endeavour to meet the defence of the statutes cannot prevail. The deed does not purport to constitute *Benjamin* the agent of *William* for any purpose, and the payment of the £300 must, I think, be taken to have been a payment by *Benjamin* solely in respect of his obligations under the deed of 1866. *Benjamin* has in his answer treated the payment as a payment on account of the firm, and as on account of the partnership debt, which in a sense it was, there being, undoubtedly, a debt from the two partners to the testator; but it was not, I conceive, a payment by *Benjamin*, as *William's* agent, expressly or impliedly constituted to make the payment. To hold otherwise would, it seems to me, be to disregard the clear and express words of the 14th section of the *Mercantile Law Amendment Act*, 1856, and to render inoperative that statute as regards one class of co-debtors, viz., persons who while partners become co-debtors, and have ceased to be partners. If while the partnership subsisted each partner could and should be deemed to be the agent of the other to make payments, so as to exclude the operation of the statute, such agency, I consider, terminated on the dissolution of the partnership; no such agency being by the deed of dissolution expressly or necessarily or otherwise impliedly created. During the partnership the *Mercantile Law Amendment Act* was, I consider, inapplicable, payments made by either partner being payments of the firm. But on the partnership determining, payments by one could only be the payments of both the persons who had been partners by proof of such one being authorized to make the payments as the payments of the other. As regards the statements in *Benjamin's* answer which bear upon this, it is to be observed that they are not very clear and explanatory in their terms; and although the Plaintiff included such answers in the evidence, of the reading of which, as against *William*, he gave *William* notice, it is not, I think, unimportant, in estimating the weight of the evidence contained in such answers, to bear in mind that *Benjamin* is dead, and has not been cross-examined; and it must be remembered that *William* swears that he never, after the dissolution, directly or indirectly, paid anything to the testator on account of the partnership debt. The

cases of *Thompson* v. *Waithman* (1) and *Bristow* v. *Miller* (2) support the view I have taken; and the former of these cases I consider an important authority as to this, although it has since, in *Jackson* v. *Woolley* (3) and other cases, been held that the Vice-Chancellor took an erroneous view in holding the Act of Parliament to be retrospective. In *Bristow* v. *Miller*, *Crampton*, J., said: "*Kilgorn* v. *Finlyson* (4) is a clear authority to shew that after a partnership is dissolved one of the late firm cannot by his act or admission involve his co-partner in any new legal liability. In that case one partner had upon a dissolution been appointed to liquidate the debts of the partnership, but it was held that any acknowledgment of debt by him would not affect the other partner. The acknowledgment was referred to the new capacity of the partner as manager to wind up the concern." It does not appear that the £300 was in fact paid out of partnership assets collected by *Benjamin*. Indeed, I think it is to be inferred from paragraph 11 of the bill, from the banking-book of *Benjamin* (which was produced), and from what appears in the deeds as to the sources from which payments had been made, that it was not. At all events, the Plaintiff has not proved that it was so paid. I do not say that, had he proved so, this would have sustained his bill.

It was attempted to get rid of the effect of the Statutes of Limitation by saying that they do not apply to cases like the present, there being, it is said, a fiduciary relation amounting to a trust. *Burdick* v. *Garrick* (5) was cited as to this, but that case, I think, depended on the special nature of the deed under which moneys were to be received and invested, and the case of *In re Hindmarsh* (6) is an authority that the relation of trustee and *cestui que trust* does not ordinarily exist between solicitor and client, although the solicitor may have received moneys from or for the client.

It was further attempted to get rid of the statute by saying that *William* had given an acknowledgment of the debt which would take the case out of the statute. This alleged acknowledgment was contained in a letter written to his solicitor for the purpose of

(1) 3 Drew. 628. 2 Jur. N.S. 1080
(2) 11 Ir. L. Rep. 461.
(3) 8 E. & B. 778. 4 Jur. N.S. 1052
(4) 1 H. B. 155.
(5) Law Rep. 5 Ch. 233.
(6) 1 Dr. & Sm. 129.

V.-C. H. 1875 WATSON v. WOODMAN.

being, as is alleged, communicated to the testator, and which it is said was so communicated. I consider that the letter, whether it be read alone or in conjunction with the evidence as to it, was not sent to the solicitor for the alleged purpose, and that this contention fails.

It is unnecessary for me, having regard to what I have already said, to consider the further contention of *William's* counsel, that if the £300 should be deemed to be his payment, certain other sums paid by *Benjamin* to the testator, which, it was said, appear, or at all events upon an account being taken would, it was said, appear, to be more than the amount of the Plaintiff's claim, should also, especially having regard to *Benjamin's* obligations under the dissolution deed, be considered to be payments on account of the partnership debt; nor whether, as was contended by the Plaintiff, such other sums were in fact paid, or if in fact paid, should, under the circumstances, be deemed to have been paid in respect of new dealings and transactions between *Benjamin* and the testator, leaving the partnership debt unsatisfied except to the extent of the £300.

Nor is it necessary for me to consider whether, as was contended on behalf of *William*, the testator accepted *Benjamin* as his sole debtor, and thus released *William*.

On the whole, I consider that the Plaintiff has not made out his case, and that the bill must be dismissed with costs as regards *William Woodman* and *Edward Thomas Row*, who is a formal party as executor of the testator.

Solicitors: Messrs. *Gregory, Rowcliffes, & Rawle;* Mr. *Evans;* Messrs. *E. Flux & Leadbitter.*

(1875) L. R. 20 Eq. 733. *Ex parte* ROBERTSON.

*Applied.* BANQUE DES MARCHANDS DE MOSCOU *v.* KINDERSLEY [1951] 1 Ch. 112

## *Ex parte* ROBERTSON. *In re* MORTON.

C. J. B.
1875
*May* 24; *June* 7.

*Bankruptcy—Jurisdiction—Foreign Creditor resident Abroad—Effect of Proving Debt—Notice of Motion—Service out of Jurisdiction—Waiver of Irregularity —Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *ss.* 2, 72–76—*Bankruptcy Rules*, 1870, *r.* 50.

A foreign creditor, residing out of the jurisdiction of the Court of Bankruptcy, by proving a debt in a bankruptcy or liquidation, brings himself within the general jurisdiction of the Court as to the administration of the estate, just as if he were residing within it. An order can therefore be made on him to restore property of the bankrupt or debtor improperly in his possession.

A notice of motion was served out of the jurisdiction on the Respondent. No order authorizing the service had been obtained from the Court. The Respondent appeared on the hearing of the motion, and objected to the jurisdiction of the Court. On his objection being overruled, he asked for and obtained an adjournment to enable him to answer the case on its merits:—

*Held*, that there had been a mere irregularity in the service, and that it had been waived.

THIS was an appeal from a decision of the Judge of the *Newcastle-on-Tyne* County Court.

*William Morton* and *Edmund Morton*, potato merchants at *Newcastle*, filed a liquidation petition on the 18th of February, 1874, and the same day a receiver and manager of their property and business was appointed. At the first meeting of the creditors, on the 13th of March, 1874, the creditors resolved on a liquidation by arrangement, and appointed *J. B. Benson* and *J. Greener* trustees of the debtors' property.

The debtors had been in the habit of purchasing potatoes from *Donald Robertson*, a potato merchant, who resided at *Mayfield*, in the parish of *Cupar*, in *Scotland*, and was a domiciled Scotchman. He had no residence or place of abode in *England*. On the 17th of February, 1874, the debtors owed him £367 2*s*. 11*d*. for potatoes, and they sent him by post a cheque for £120, drawn upon Messrs. *Lambton & Co.*, bankers at *Newcastle*. He received this cheque on the 18th of February, and paid it to his bankers, by whom it was sent the same day back to *Newcastle*, and it was on the 19th of February honoured by *Lambton & Co.*, who were then ignorant of the filing of the liquidation petition.

C. J. B. 1875 *Ex parte* ROBERTSON. *In re* MORTON.

*Robertson* proved in the liquidation for £247 2*s.* 11*d.*, the balance remaining due to him after giving credit for the £120; the proof was admitted by the trustees, and on the 27th of October, 1874, they paid him a dividend of 4*s.* 6*d.* in the pound.

The above-mentioned facts afterwards came to the knowledge of the trustees, and on the 6th of March, 1875, *Robertson* was served at *Mayfield* with a notice of motion on their behalf, stating that an application would be made to the County Court on the 12th of March for an order that he should repay the £120 to the trustees. No order for service on him had been made. On the 12th of March, Mr. *Philipson*, a solicitor at *Newcastle*, appeared on behalf of *Robertson*, and objected that the Court had no jurisdiction over him. The Judge overruled the objection, and Mr. *Philipson* then asked for an adjournment, on the ground that he was not then prepared to go into the merits of the case. The Judge granted an adjournment for a month, on the terms of *Robertson* paying £100 into Court within a fortnight, and also paying the costs of the adjournment. On the subsequent hearing of the motion on the 23rd of April, counsel appeared for *Robertson*, and took the objection as to the jurisdiction. The Judge overruled it, and *Robertson's* counsel withdrew before the evidence on the merits of the case was heard. *Robertson* had filed an affidavit in which he took the objection of want of jurisdiction, on the ground that he was a domiciled Scotchman, having no residence in *England*, and also deposed to facts bearing on the merits of the case. The Judge made an order in the terms of the notice of motion.

*Robertson* appealed.

Mr. *De Gex*, Q.C., and Mr. *Finlay Knight*, for the Appellant:—

An English Court of Bankruptcy has no jurisdiction over a domiciled Scotchman resident in *Scotland*. If this had not been a case of bankruptcy, no action could have been brought in an English Court against the Appellant to recover this money; he must have been sued in *Scotland*. Sects. 66 and 72 (1) of the

(1) Sect. 65 provides that "the Chief Judge in Bankruptcy shall have all the powers, jurisdiction, and privileges possessed by any Judge of Her Majesty's Superior Courts of Common Law at *Westminster*, or by any Judge of Her Majesty's High Court of Chancery, and the orders of such Judge

*Bankruptcy Act*, 1869, do not give the Court of Bankruptcy a jurisdiction larger than that of the Court of Chancery or one of the superior Courts of Common Law.

Moreover, the notice of motion was not effectually served on the Appellant. In *Ex parte O'Loghlen* (1) it was held that a debtor's summons could not be served out of the jurisdiction, there being no power given by the Act or the Rules to effect a service there, and that such a service, though made under an express order of the Court, was a nullity. This applies equally to service of a notice of motion under Rule 50 of the *Bankruptcy Rules*, 1870 (2), for no power is given to serve the notice out of the jurisdiction, and the shortness of the interval allowed for service shews that the rule could not have contemplated service out of the jurisdiction.

[They were stopped by the Court.]

Mr. *Little*, Q.C., and Mr. *Colt*, for the trustees:—

The Appellant having proved and received a dividend, the Court has complete jurisdiction under sect. 72 to compel him to refund any part of the debtors' estate which is improperly in his hands. Sect. 74 of the Act enables the Scotch Courts, which have jurisdiction in bankruptcy, to enforce in *Scotland* orders made by the English Bankruptcy Courts, and sect. 75 makes the English and Scotch Bankruptcy Courts auxiliary to each other. The order in this case was rightly made by the English Court, but it must be

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shall be of the same force as if they were judgments in the Superior Courts of Common Law, or decrees in the High Court of Chancery."

Sect. 66: "Every Judge of a local Court of Bankruptcy shall, for the purposes of this Act, in addition to his ordinary powers as a County Court Judge, have all the powers and jurisdiction of a Judge of Her Majesty's High Court of Chancery, and the orders of such Judge may be enforced accordingly in manner prescribed."

Sect. 72 provides that, "Subject to the provisions of this Act, every Court having jurisdiction in bankruptcy under this Act shall have full power to decide all questions of priorities, and all other questions whatsoever, whether of law or fact, arising in any case of bankruptcy coming within the cognizance of such Court, or which the Court may deem it expedient or necessary to decide for the purpose of doing complete justice, or making a complete distribution of property in any such case."

(1) Law Rep. 6 Ch. 406.

(2) Rule 50 provides that a notice of motion must be "served upon the party or parties to be affected thereby four clear days at least before the day named in such notice as the day when the motion is to be made."

C. J. B. 1875 *Ex parte* ROBERTSON. *In re* MORTON.

enforced by the Scotch Court. In *Ex parte Tait* (1) it was held that the Court had jurisdiction to restrain a creditor from suing in *Ireland* in respect of a debt included in a deed which the debtor had executed under the *Bankruptcy Act*, 1861. Under the old bankruptcy law it was held that a creditor who had proved was subject to the jurisdiction of the Court in respect of his proof: *Ex parte Hilton* (2). As to the service of the notice of motion, there has been nothing more than an irregularity, which has been waived by the Appellant's asking for time to answer the case on its merits, and filing an affidavit upon the merits. *Ex parte O'Loghlen* (3) does not apply.

Mr. *De Gex* in reply:—

The service out of the jurisdiction was, as is shewn by the *ratio decidendi* of *Ex parte O'Loghlen*, a complete nullity—not a mere irregularity which could be waived. As to the jurisdiction, my argument is that this proceeding is equivalent to the bringing of any action for money had and received in an English Court against a domiciled Scotchman resident in *Scotland*. That cannot be done. *Davis* v. *Park* (4) and *Cookney* v. *Anderson* (5) shew very clearly what are the principles which govern the territorial jurisdiction of Courts. Sect. 72 of the Act gives the Court of Bankruptcy no higher jurisdiction than that of the Court of Chancery or the Courts of Common Law. *Ex parte Tait* does not apply. Proof of debt does not amount to a complete submission to the jurisdiction of the Court. *Ex parte Hilton* only shews that the dividend on the debt proved for may be retained, or that a dividend paid may be recalled. It is no authority for saying that the Court has jurisdiction to order a creditor who has proved to repay some other fund which he has received from the debtor. *Ex parte Dobson* (6) shews that the Court formerly had no such power, and I say that sect. 72 does not confer it.

SIR JAMES BACON, C.J.:—

Two objections have been taken to this order. The first and

(1) Law Rep. 13 Eq. 311.
(2) 1 Jac. & W. 467.
(3) Law Rep. 6 Ch. 406.
(4) 42 L. J. (Ch.) 204, 208.
(5) 1 D. J. & S. 305.
(6) 1 Mont. & A. 666.

larger one is that the Court has no jurisdiction to make such an order against the Appellant because he is a domiciled Scotchman. The second is that the Court has proceeded erroneously in making the order, even if it had a right in other respects to make it, because there had been no proper service of the notice of motion. The two questions are totally distinct from each other, the first, the larger and more important one, being whether, under the existing Act of Parliament and the existing practice of the Bankruptcy Court, the Court at *Newcastle* had power to make an order directing the Appellant to pay back the £120, part of the debtors' estate, which he had received. Now, that is a question, no doubt, of very great importance. Every question, indeed, of jurisdiction is of vital importance. The question can be decided only by an inspection of the existing Act of Parliament. That there was a valid bankruptcy, or an arrangement which is equivalent to bankruptcy, prosecuted in the proper Court, is not questioned in the slightest degree. Then the 72nd section of the Act provides:— [His Lordship read the section.]

Now let us inquire, first, whether the subject-matter of this application comes within those words. It is not disputed that on the 18th of February an act of bankruptcy was committed, and after that the Appellant possesses himself, not unnaturally or wrongfully in any other than a legal sense, of £120, part of the debtors' estate. The law is that, from the appointment of the trustee in a liquidation, he shall have all the powers and rights of a trustee in bankruptcy, and therefore, on the 18th of February, and before the receipt by the Appellant of the £120, the whole of the debtors' estate, including that sum, which was part of the debtors' estate before it was received by the Appellant, was vested in the trustee. The Appellant came in under the liquidation proceedings. He made an affidavit, which stated that a certain debt was due to him at the institution of the proceedings, and that it was still justly due and owing. In stating that amount he gave credit to the debtors' estate for the £120, not in terms, but it appears by the result that he excluded it from his proof of debt. He came in under the liquidation, and what is the consequence of creditors coming in under a liquidation or bankruptcy? They come in under what is as much a compact as if each of them had

C. J. B. 1875 *Ex parte* ROBERTSON. *In re* MORTON.

signed and sealed and sworn to the terms of it—that the bankrupt's estate shall be duly administered among the creditors. That being so, the administration of the estate is cast upon the Court, and the Court has jurisdiction to decide all questions of whatever kind, whether of law, fact, or whatever else the Court may think necessary in order to effect complete distribution of the bankrupt's estate. Can there be any doubt that the Court had jurisdiction to get back that £120? I am not touching upon the merits of the case, nor am I expressing any opinion upon them; but can there be any doubt that the Appellant in this case has agreed that, as far as he is concerned, and as far as the whole of the creditors proving are concerned, the law of bankruptcy shall take effect as to him, and under this jurisdiction, to which he is not only subjected, but under which he has become an active party, and of which he has taken the benefit, and is entitled as much as any other creditor, though not more than any other creditor, to insist on the due distribution of the whole of the debtors' estate?

It is said that this Court, being an English Court, has no jurisdiction over this gentleman who has entered into this, which I call a compact, who has come in under it, and has been a party to the administration of the estate in the manner I have mentioned, because he lives on the other side of the border. I am of opinion that there is no ground whatever for that, and I think that he is as much bound to perform the conditions of the compact, and to submit to the jurisdiction of the Court, as if he had never been out of the limits of *England*.

The other objection is, that there has not been due service of the notice of the motion by which the Appellant was called upon to account for that £120. It is quite true, as I understand the case, that the service was very defective in point of regularity; but that the notice was actually brought to his attention is not only stated in the affidavit, but, in point of fact, on the very day when the notice of motion was to be heard, the day on which it was returnable, as it is called, he, by his attorney, came into Court and raised his objection that the Court had no jurisdiction. The objection as to irregularity was waived.

What would have happened if it had been taken? *Philipson*

comes into Court and says, You cannot do anything, for two reasons. One of them is, that you have no jurisdiction; and the other is, that the notice with which my client has been served is not a good one. In that case the learned Judge below would have said, I will make no order upon this notice of motion, but I will allow it to stand over in order that the four days' notice may be properly given. But, in fact, the Appellant comes in and says, You have no jurisdiction; and, besides that, I want time to answer; and asks for further time, when he finds that the Judge is not with him on the subject of jurisdiction. The learned Judge accedes to this request for further time, and does allow the matter to stand over till another day on certain terms. He gave the Appellant time to answer the summons which had been confessedly served upon him, although served irregularly. The adjournment took place as a matter of course, and when the day which had been fixed for the adjourned hearing arrived there was an affidavit by him going into the merits of the case. It was stated in this affidavit that he was a domiciled Scotchman, and he submitted that the Court had no jurisdiction over him. Upon every rule of practice that was a perfect and complete waiver of the technical objection that there had been an inadequate service.

When *Ex parte O'Loghlen* (1) was referred to I told Mr. *De Gex* that I did not agree that the *ratio decidendi* there given was in his favour. The interlocutory proceeding in that case, that is, the service of the debtor's summons, the disobedience to which constitutes an act of bankruptcy, was of the very greatest consequence, and the question raised before the Court was, not whether there had been a due service of the summons, because there was no question that the debtor had been served, and there was no irregularity in the service, but a want of legal efficacy was suggested. I cannot come to the conclusion that on the facts Sir *Coleman O'Loghlen* was amenable to the English process in bankruptcy—the Act having expressly said that it should not apply to *Scotland* or *Ireland*—merely because he was out of *Ireland* by accident, and had been served in *England*, being a Member of Parliament resident in *London*, for the purpose of discharging his Parliamentary duties,

(1) Law Rep. 6 Ch. 406.

C. J. B. 1875 *Ex parte* ROBERTSON. *In re* MORTON.

where they took an opportunity of serving him. But that was no ground for deciding that the Court had jurisdiction to order service of the summons.

I do not agree with Mr. *De Gex* that the *ratio decidendi* there was that the service had been wrong. Lord Justice *Mellish*, in the course of his observations, directs himself to the particular proceeding before him, which was the service of a debtor's summons. It is impossible to read his judgment in any other light, and the Court accordingly decided that Sir *Coleman O'Loghlen* was a person not under any circumstances subject to the jurisdiction of the Court, and therefore that the Court could have no jurisdiction over him. Well, then, what am I to do with respect to this, this being really the point of the case? I find that there was an irregular service of the notice of motion on a man out of the jurisdiction. I find that that man came in with the notice of motion in his hand (as I must assume), and said, This notice has been served on me. I am subject to the laws of *Scotland*. You, as an English Judge, have nothing to do with me; and then the Judge disagrees with him, and tells him that he has. Thereupon his solicitor asks for time, that he may address himself to the merits of the case. That was a waiver of the mere irregularity in form, and there was not an irregularity in substance, as in the case of Sir *Coleman O'Loghlen*. There it was substance, here it was an irregularity of form merely; and it is the practice in this Court, beyond all question, and the practice of every other Court, in all cases to cure irregularity by accepting the waiver of the person affected by it. What is the real gist and reason of this rule which requires a four days' notice of motion? It is that the person who is to be affected by it shall have time to set himself right, and to file his affidavits. He is not to be compelled to come into Court on a shorter notice than four days, nor even then if he can make out any ground for extending the time. The case of *Ex parte Hilton* (1) was plain enough according to the law as it then stood. There was no 72nd section then, and no law by which the Court could compel the delivery up of property of a bankrupt held by a creditor. The case is different now, because the 72nd section supplies the defect, and makes it

(1) 1 Jac. & W. 467.

unnecessary to bring an action, as in *Ex parte Dobson* (1). No necessity exists for it now, for a wiser provision has been made. In my opinion it is wiser and more consistent with justice that the law should enable the Court of Bankruptcy to exercise, I was going to say unlimited, jurisdiction over every man who claims the benefit of the process of the Court and who has obtained it, and who has, therefore, in the most formal and explicit manner, subjected himself to the jurisdiction of the Court. I think, therefore, that the judgment of the Court below cannot be assailed on either of the two grounds I have mentioned.

I am much obliged to Mr. *De Gex* for reading the judgment in *Cookney* v. *Anderson* (2), for it is very pleasant to hear so lucid an explanation of the law, conveyed in such choice terms as those in which Lord *Westbury* expressed himself. But if you look at that case closely you will find that it is less favourable to the argument than the general scope of the reasoning seemed to be. You will find that Lord *Westbury* limits what he says to the case of a party who does not appear, or who is absent from the jurisdiction. But I have to deal with a case in which he plainly did appear.

It was directed that the case should be remitted to the County Court to be decided upon the merits, with a declaration that that Court had jurisdiction in the matter.

Solicitors for the Appellant: Messrs. *Williamson, Hill, & Co.*, agents for Mr. *J. A. Philipson, Newcastle-on-Tyne.*

Solicitor for the Trustee: Mr. *G. B. Wheeler*, agent for Mr. *H. S. Sewell, Newcastle-on-Tyne.*

(1) 1 Mont. & A. 666.

(2) 1 D. J. & S. 365.

C. J. B.
1875
June 28.

## *Ex parte* ELWORTHY. *In re* ELWORTHY.

*Composition—Validity—Small amount of Assets—Registration of Resolutions—Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *s.* 126—*Bankruptcy Rules*, 1870, *r.* 295.

A debtor filed a liquidation petition, and the creditors unanimously resolved to accept a composition of 3*d.* in the pound. The debts were £130; the assets amounted to £7. The Registrar refused to register the resolutions, though no creditor opposed, on the ground that there were "no available assets for distribution among the creditors."

*Held*, that, as all the requirements of the *Bankruptcy Act* and the Rules had been complied with, the resolutions must be registered.

THIS was an appeal from a decision of the Judge of the *Greenwich* County Court.

On the 8th of March, 1875, *Alfred Elworthy* filed a liquidation petition. His statement shewed that he owed debts amounting to £130, and that his assets amounted to £7. The first meeting of the creditors was held on the 24th of March. Four creditors, whose debts together amounted to £72, were present at the meeting. They resolved unanimously to accept a composition of 3*d.* in the pound, and this resolution was unanimously confirmed at the second meeting on the 7th of April, the same four creditors only being present. When the resolution was presented to the Registrar for registration, no creditor appeared to oppose. The Registrar, however, refused to register it, on the ground that there were "no available assets for distribution among the creditors." The Judge affirmed this decision. *Elworthy* appealed.

Mr. *Horton Smith*, for the Appellant:—

If it were true that there are no assets the offer of 3*d.* in the pound would be a good one. At any rate, the creditors at the meeting were unanimous, and no creditor opposed the registration. The duty of the Registrar as to registration is only ministerial; he has to see that the requirements of the *Bankruptcy Act*, 1869, and the *Bankruptcy Rules*, 1870, have been complied with: Rule 295; *Ex parte Levy & Co.* (1).

(1) Law Rep. 11 Eq. 619.

C. J. B. 1875 *Ex parte* ELWORTHY. *In re* ELWORTHY.

[The CHIEF JUDGE:—What requirement of the Act or of the Rules has not been complied with in this case?]

None at all. I contend that, in the absence of opposition, the registration is *ex debito justitiæ*.

No one opposed the appeal.

SIR JAMES BACON, C.J.:—

All the requirements of the Act and of the Rules have been complied with. Moreover, I cannot agree with the Registrar that there are no assets available for distribution; there are £7 available. The resolutions must be registered.

Solicitor for the Appellant: Mr. *W. Carus Peterson.*

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## *Ex parte* WILLIAMS. *In re* WILLIAMS.

C. J. B. 1875 *June* 28.

*Status of undischarged Debtor—Second Liquidation Petition before Discharge under First—Rights of Creditors under First Petition—Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *ss.* 54, 125—*Bankruptcy Rules*, 1870, *rr.* 183–185, 256.

A debtor filed a liquidation petition, and his creditors resolved on a liquidation. All his property was realized by the trustee, and dividends amounting to less than 10*s.* in the pound were paid to the creditors. They then resolved to close the liquidation and to release the trustee, but they did not grant the debtor a discharge. He contracted fresh debts, and more than three years afterwards he filed a second liquidation petition.

The creditors met and resolved on a liquidation, but the Registrar refused to register the resolutions because no notice of the meeting had been given to the creditors under the first petition:—

*Held*, that no such notice was necessary, and that the resolutions ought to be registered.

The creditors under the first petition had no rights against the debtor's property except under the provisions of sect. 54 of the *Bankruptcy Act*, 1869.

THIS was an appeal from a decision of the Judge of the *Cardiff* County Court.

*Thomas Williams*, a grocer at *Cardiff*, filed a liquidation petition on the 12th of August, 1870. On the 29th of August the

C. J. B. 1875 *Ex parte* WILLIAMS. *In re* WILLIAMS.

creditors resolved upon a liquidation by arrangement and appointed a trustee. The trustee realized the whole of the debtor's estate, and thereout paid the creditors dividends amounting to 6*s.* 10½*d.* in the pound. On the 4th of January, 1871, a meeting of the creditors was held to consider the question of granting a release to the trustee and an order of discharge to the debtor, and the creditors then resolved that the close of the liquidation should take place on and from the 14th of January, 1871, and that the trustee should be released on and from the same day; but no order of discharge was granted to the debtor. The debtor went into business again, and contracted fresh debts, and on the 15th of March, 1875, he filed a second liquidation petition, under which, on the 31st of March, the creditors met and resolved on a liquidation by arrangement and appointed a trustee.

No further payment had been made to the creditors under the first petition.

The Registrar refused to register the resolutions, on the ground that no notice of meeting under the second petition had been given to the creditors under the first petition. This decision was confirmed by the Judge. *Williams* appealed.

Mr. *Finlay Knight*, for the Appellant:—

The creditors under the first petition were not entitled to any notice of the meeting under the second petition. If notice had been given them, and they had attended, they could not have voted. The close of the first liquidation discharged the after-acquired assets of the debtor, and the subsequent creditors are primarily entitled to those assets: *Ex parte Sir William Russell* (1) It is only as against the debtor's interest in these assets that the creditors under the first petition have any claim, and that claim can only be enforced by means of an application to the Court under sect. 54 (2) of the *Bankruptcy Act*, 1869.

(1) Law Rep. 10 Ch. 255, 260.

(2) Sect. 54: "Where a person who has been made bankrupt has not obtained his discharge, then, from and after the close of his bankruptcy, the following consequences shall ensue:—

"1. No portion of a debt provable under the bankruptcy shall be enforced against the property of the person so made bankrupt until the expiration of three years from the close of the bankruptcy; and during that time, if he pay to his creditors such additional sum as will, with the dividend paid out of his

No one appeared to oppose the appeal.

SIR JAMES BACON, C.J. :—

To what end or for what purpose should notice of the meeting under the second petition have been given to the creditors under the first petition? They could not rank as creditors under it. They could not have voted at the meeting or have taken any part in the proceedings. I think, therefore, that notice to them was not necessary. These proceedings can take nothing away from them. They cannot enforce their rights against the debtor's property except under the provisions of sect. 54; and by the terms of that section they cannot interfere with the rights of those persons who have become creditors since the close of the former liquidation. They are judgment creditors, but they can only enforce their rights with the sanction of the Court; notice to them would be a useless proceeding, for no right which they possess is taken away by anything which is done under the second liquidation. The resolutions must be registered.

Solicitors for the Appellant: Messrs. *Sharp & Ullithorne*, agents for Mr. *J. Merrils, Cardiff*.

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property during the bankruptcy, make up 10*s.* in the pound, he shall be entitled to an order of discharge in the same manner as if a dividend of 10*s.* in the pound had originally been paid out of his property.

"2. At the expiration of a period of three years from the close of the bankruptcy, if the debtor made bankrupt has not obtained an order of discharge, any balance remaining unpaid in respect of any debt proved in such bankruptcy (but without interest in the meantime), shall be deemed to be a subsisting debt in the nature of a judgment debt, and, subject to the rights of any persons who have become creditors of the debtor since the close of his bankruptcy, may be enforced against any property of the debtor, with the sanction of the Court which adjudicated such debtor a bankrupt, or of the Court having jurisdiction in bankruptcy in the place where the property is situated, but to the extent only, and at the time and in manner directed by such Court, and after giving such notice and doing such acts as may be prescribed in that behalf."

Rules 183–185 of 1870 prescribe the way in which such applications to the Court are to be made, and the notices which are to be given.

C. J. B.

1875
July 5.

## *Ex parte* HODGKIN. *In re* SOFTLEY.

*Fraudulent Preference—Act of Bankruptcy—Security given in fulfilment of prior Voluntary Promise—Equitable Mortgage of unfinished Ship—Deposit of Builder's Certificate—Consolidation of Mortgages—Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *ss.* 6 (*sub-s.* 2), 92.

W.R. D. 132-3
Ch. D 325

In August *S.*, a shipbuilder, whose account current with his bankers was overdrawn, offered to give them security upon a ship which he was building. The bankers declined to accept the security then, but said that circumstances might arise to make it desirable that they should have it, and he promised to give it them when they wished it. On the 28th of September the offer was renewed, but the bankers urged him to sell the ship, and so prevent the necessity of their taking the security. On the 7th of October *S.* had an interview with them at the bank, and they told him that they would accept the security, and that he was to lodge the builder's certificate of the ship with their manager. The next day he signed the certificate, and gave it to the bank manager. The certificate described the ship and her engines, and stated that she had been built for the bank manager. At this time she was not launched, but was in an unfinished state in the builder's yard. The engines were not on board, but were lying unfinished in the yard of the firm who were making them for the shipbuilder. On the 9th of October the shipbuilder had another interview with the bankers, when they told him they could advance him no more money, and did not see how he could go on, to which he assented; but they agreed to advance him £770 to pay his workmen's weekly wages, on the security of an assignment of a debt owing to him from another person, and told him that they could go no further, and that he had better consult his solicitor as to his position. On the 10th of October the manager endeavoured to get himself registered as the owner of the ship, but, as she was not launched, this could not be done. But he placed a man in possession of her, and fixed a notice upon her that she was his property. On the 10th of October *S.* paid his workmen, and then discharged them, and closed his place of business. On the 12th of October he filed a liquidation petition:—

*Held*, that both the securities given to the bankers were valid as against the trustee in the liquidation, there not being in the transactions anything amounting to either a fraudulent preference or an act of bankruptcy:

*Held*, also, that the deposit of the builder's certificate created a good equitable mortgage of the unfinished ship, including the engines which were being built for her, but subject as to the engines to any lien for unpaid purchase-money to which the engine-builders might be entitled:

*Held*, also, that the assignment of the debt having been given after the insolvent position of *S.* was disclosed, was a security for the £770 only, and could not be made available by consolidation or otherwise to secure the past debt.

THIS was an appeal from a decision of the Judge of the *Newcastle-on-Tyne* County Court.

C. J. B. 1875 *Ex parte* HODGKIN. *In re* SOFTLEY.

*John Softley* was a shipbuilder at *South Shields*. He kept an account current with Messrs. *Hodgkin, Barnett, & Co.*, bankers, of *Newcastle*, at their branch bank at *South Shields*. The bankers made him advances from time to time by allowing him to overdraw his account. In order to obtain these advances, he was in the habit of shewing to the bankers at the commencement of every month an account of the sums which he should have to pay and the sums which he expected to receive during the month.

From the evidence of Mr. *Robert Spence*, one of the partners in the banking firm, it appeared that, on the 31st of August, 1874, *Softley's* account being then overdrawn to the extent of £7500, the bankers had an interview with him at their bank in *Newcastle*. He offered them security upon a ship called No. 111, which he was then building in his yard, but, as the account which he then produced of his probable receipts and payments during the next month shewed that he was perfectly able to meet his engagements, they declined to accept the offered security then, but they told him that circumstances might arise which might make it desirable for them to have it, and he agreed to let them have it at any time thereafter, if they should desire it. At this interview *Softley* also stated that a Mr. *Avery* owed him £11,000, and the bankers pressed him to get bills from *Avery* for this amount, and early in September *Softley* succeeded in getting bills from *Avery* to the extent of £6000, part of the debt. On the 28th of September *Softley's* son called on the bankers at their bank in *Newcastle*, and told them that *Avery* would pay £6000 to his father on the 22nd of October, and that ship No. 111 would be launched on the 30th of September. He said that several persons were in treaty for her, but that if none of them came to terms, *Avery* would purchase her for £9000. The son offered the bankers security upon No. 111, but they urged him to sell her, and so to prevent the necessity of their taking security. On the 7th of October the bankers had another interview with *Softley*, at their bank in *Newcastle*, and he submitted to them a statement of his probable receipts and payments. As his overdraft was continuing, and the ship No. 111 was not sold, they told him that they would accept the security before offered upon that ship, and that he was to lodge the builder's certificate of the ship with Mr. *Scott*, the

C. J. B.
1875
*Ex parte* HODGKIN.
*In re* SOFTLEY.

manager of the branch bank at *South Shields*. The bankers also instructed Mr. *Scott* to take the necessary steps to get himself registered at the Custom House as the owner of the ship. On the 8th of October *Softley* lodged the builder's certificate of the ship with the bankers. This document was dated the 8th of October, and it specified the particulars of the ship and her engines, as required by the *Merchant Shipping Act*, 1854, and it certified that *Softley* had built the ship for and on behalf of Mr. *Scott*. At this time the ship was still on the building slip; her hull was incomplete, she had no masts, and her engines were not on board. The engines were in fact unfinished, and were in the possession of a firm of *Marshall, Osborne, & Co.*, who were constructing them under a contract with *Softley*. On the 10th of October, 1874, *Scott* signed a declaration of ownership of the ship, as required by the *Merchant Shipping Act*, 1854, with the view of getting himself registered as the owner. As, however, the ship was not afloat, no registration could be effected. But on the 10th of October *Scott* placed a man in possession of the ship in *Softley's* yard, and a board was put upon her stating "This ship is the property of *Thomas Scott*, bank agent." On the 9th of October the bankers had another interview with *Softley* at their bank in *Newcastle*. He then produced a statement of his probable receipts and payments for October, from which it appeared that the debt due to him from *Avery* was considerably less than he had at first represented it to be, and that it did not, in fact, after allowing for the bills which *Avery* had given, amount to more than £2300. At this interview, also, *Softley* for the first time told the bankers that the engines were not in the ship, although they were mentioned in the builder's certificate, but that they were in *Marshall, Osborne, & Co.'s* yard. The bankers then told *Softley* that they could not continue their advances to him. *Softley* urged them to do so, and they agreed to advance him £770 to enable him to pay the week's wages due the next day (a Saturday) to his workmen, upon his giving them as security an assignment of the debt to him from *Avery*, but they told him that they could not go further, and that he had better consult his solicitor as to his position and the prospect of his continuing his business. *Softley* agreed to assign *Avery's* debt to the bankers, and gave

them a letter to that effect, and the same day he executed a formal assignment of the debt, of which the bankers gave notice to *Avery*. On the 10th of October *Softley* paid his workmen their week' wages, and discharged them. He closed his yard, and did not open it again; and on the 12th of October he filed a liquidation petition, under which Mr. *Winter* was appointed trustee. The bankers denied that they knew that *Softley* was in insolvent circumstances until their interview with him on the 9th of October.

*Softley* was examined, and his evidence in the main confirmed the statements of Mr. *Spence*. *Softley* also stated that about the beginning of September, 1874, there was a report in the town that he was insolvent, and that two or three of his creditors came to him to ask him about it. He referred them to the bankers, with the authority of the latter, and the result was that the creditors continued to supply him with goods. He also stated, with regard to his interview with the bankers on the 7th of October, that they then told him he must lodge the builder's certificate of the ship with Mr. *Scott*. He said, also, that at the interview on the 9th of October, after some conversation with the partners in the bank, Mr. *Scott* said, "Now, Mr. *Softley*, we cannot see our way clear to advance you any more money after paying wages." *Softley* then told them that the vessel was not worth £9000 without the engines being put in her, and that he could complete her for £350, and that if they kept him going for another month, they would increase their security. They said they would not advance any more money, and he replied, "Well, I have shewed it to you."

Mr. *Scott* was also examined, and he stated that on the 9th of October he said to *Softley*, "I do not see how you are to go on," to which *Softley* replied, "I don't see that I can." The assignment of *Avery's* debt to the bankers, which was executed by *Softley* on the 9th of October, contained a recital that *Softley*, being indebted to the bankers in a considerable sum of money, had agreed to assign the debt thereinafter mentioned to them, and an absolute assignment to them of *Avery's* debt, which was described as amounting to £2384. There was no proviso for redemption.

The trustee disputed the validity of both the securities, on the ground that they constituted fraudulent preferences and acts of bankruptcy. The Judge made an order declaring that the ship

C. J. B. 1875 *Ex parte* HODGKIN. *In re* SOFTLEY.

No. 111, together with the engines in course of being built for her, were a security to the bankers for their advances to *Softley*, and that they were entitled to complete, launch, and sell the ship, and to complete and sell the engines, and to have the proceeds of sale applied in payment of their advances; and it was further declared that the assignment to the bankers of *Avery's* debt was a good and valid security, and that the bankers were entitled to the benefit thereof, and to have the proceeds of the debt applied in payment of their advances to *Softley*. The trustee appealed.

The order appealed from was made in the absence of *Marshall, Osborne, & Co.*, but they presented an appeal from it.

Mr. *Little*, Q.C., and Mr. *Doria*, for the trustee :—

The giving of the security on the ship amounted to a fraudulent preference. It was not demanded by the bankers before it was thrust on them by the customer. The promise made in August to give it at a future time was a purely voluntary one, and when the security was actually given the bankers must have been well aware that *Softley* was hopelessly insolvent: *Ex parte Kevan* (1). The giving of the security was also an act of bankruptcy under sect. 6 (sub-sect. 2) of the *Bankruptcy Act*, 1869, as a fraudulent transfer of a part of the debtor's property. The postponement of the giving of the security till there was an actual state of insolvency is evidence of an intent to defraud the general creditors: *Ex parte Fisher* (2). If the transaction comes under the *Bills of Sale Act*, which we contend it does, as the ship was incomplete, there was an attempt to evade the provisions of the Act: *Ex parte Cohen* (3). The possession taken was ineffectual, as no right had been given to the mortgagee to take any possession at all. The deposit of the builder's certificate did not amount to an equitable mortgage of the ship. The property in a ship can only be transferred under the *Merchant Shipping Act* of 1854 by means of registration, and that could not be effected in this case. At any rate, the engines which were not on board could not be affected. As to the assignment of *Avery's* debt, it is rendered void by the prior act of bankruptcy. Moreover, a security which must have

(1) Law Rep. 9 Ch. 752. (2) Law Rep. 7 Ch. 636.
(3) Law Rep. 7 Ch. 20.

the effect of stopping a trader's business cannot be maintained: *Young* v. *Fletcher* (1). At any rate, the assignment can only be a security for the £770, and not for the other sums due to the bankers. The order of the County Court is clearly wrong in that respect. Though the bankers swear that they did not know of the insolvency, yet they must be taken to have drawn that which was the proper inference from the facts which they did know: *Ex parte Snowball* (2).

Mr. *De Gex*, Q.C., and Mr. *Gainsford Bruce*, for the bankers:—

There was no fraudulent preference, for there was pressure. A polite request by a man's bankers, when they have him entirely at their mercy, would amount to pressure. But *Softley* was told that he must lodge the certificate. *Ex parte Topham* (3). Moreover, a payment or transfer made in fulfilment of an obligation is not a fraudulent preference: *Bills* v. *Smith* (4). At any rate, as the bankers were ignorant of the insolvency, they are protected by the proviso in sect. 92 in favour of "incumbrancers in good faith and for valuable consideration": *Ex parte Butcher* (5). With regard to the supposed act of bankruptcy, *Ex parte Fisher* (6) was a case of an assignment of the whole of a bankrupt's property for a past debt, not of part only, as in the present case. That distinction makes just all the difference: *Ex parte Mackenzie* (7); *Ex parte Izard* (8). If there was an evasion of the *Bills of Sale Act*, that is no objection; the question is, whether the Act hits the case: *Ramsden* v. *Lupton* (9). It is clear that a sufficient possession was taken before the liquidation petition was filed: *Ex parte Lewis* (10); *Emanuel* v. *Bridger* (11). So as the mortgagee had got possession, it does not signify how he got it: *Ex parte Redfern* (12). The deposit of the builder's certificate, taken in connection with the previous agreement to give a security on the ship No. 111, constituted a good equitable mortgage between the parties. The certificate was merely for the purpose of identification; the builder

(1) 3 H. & C. 732.
(2) Law Rep. 7 Ch. 534, 549.
(3) Ibid. 8 Ch. 614.
(4) 6 B. & S. 314.
(5) Law Rep. 9 Ch. 595.
(6) Ibid. 7 Ch. 636.
(7) 42 L. J. (Bkcy.) 25.
(8) Law Rep. 9 Ch. 271.
(9) Ibid. 9 Q. B. 17.
(10) Ibid. 6 Ch. 626.
(11) Ibid. 9 Q. B. 286.
(12) 19 W. R. 1058.

C. J. B. 1875 *Ex parte* Hodgkin. *In re* Softley.

did all that he could to charge the property. No writing was necessary. As to the engines, the contract between *Softley* and *Marshall* for the building of them was similar in its terms to that for building the ship in *Ex parte Lambton* (1) in which Lord Justice *Mellish* expressed an opinion that the property in the ship passed to the purchaser subject to the vendor's lien for unpaid purchase-money. *Ex parte Reed* (2) also applies. As to *Avery's* debt, the assignment is an absolute one, and it was intended to cover all that was due to the bankers. There is no proviso for redemption.

Mr. *Little*, in reply :—

*Ex parte Fisher* (3) applies, for we shew a fraudulent dealing with a part of the debtor's property.

Mr. *Winslow*, Q.C., and Mr. *Colt*, appeared for *Marshall, Osborne, & Co.*, and claimed a lien upon the engines for unpaid purchase-money.

It was arranged that they should be heard after judgment had been given as between the other parties, their rights being reserved.

Sir James Bacon, C.J. :—

This is a case which, as I conceive, must come under the 92nd section of the *Bankruptcy Act*, and not under the 2nd sub-section of the 6th section. I think the transaction in question cannot, under any circumstances, be treated as an act of bankruptcy. It was not a transfer of the whole of the debtor's estate, and no single fact has been stated, no argument has been addressed to me which would induce me to say that it was a fraudulent transfer of a part of the debtor's estate. But whether under the 92nd section there was *primâ facie* a preference of the one creditor over the others is a matter which requires the utmost investigation, and that investigation has been carried on in the Court below, and also in the course of the argument addressed to me.

The facts are really not in dispute. *Softley*, carrying on a very extensive business, having a very heavy account with his bankers, which underwent various fluctuations, being sometimes largely

(1) Law Rep. 10 Ch. 405. (2) Law Rep. 14 Eq. 586.
(3) Law Rep. 7 Ch. 636.

overdrawn and sometimes brought within much more moderate limits, keeps that account on from the year 1872 till the latter end of the year 1874. It is proved, I think, sufficiently and distinctly as a fact, that as early at least as in August, 1874, an offer was made by *Softley* to give the bankers a security upon the ship No. 111, to secure the money which he then owed to them, and that that offer was rejected. The only difference between *Softley's* statement and theirs is this, that his narrative stops at mentioning the refusal of the bankers to accept the security, whereas the affidavits on the part of the bankers go further, and say that he was told that they would not accept the security at that time, but that circumstances might arise which would induce them to call upon him to perfect the offer which he then made. Mr. *Little* has argued, not without some reason, that that ought to be considered as if the bankers declined to take the security because they were aware that it would be inconvenient and useless to them, and would at once endanger the credit of the debtor, and that that would be properly treated as an evasion of the *Bills of Sale Act*, and, in short, an attempt to bolster up the credit of the debtor and enable him to carry on his business, they having the power at any time to call upon him to give them a security which would confer on them a preferential right over all his other creditors. But I cannot surmise that; I must deal as a jury would with the facts proved before me, and there is nothing I know of unreasonable in the conduct of the bankers, nothing that could induce me to believe they had any dishonest intention towards the other creditors. It was reasonable that they should say to this man, "Carry on your business; pay in as much as you can. We will help you as far as we can, and if the time should ever come when we should wish to have the security you have already offered us, we will call upon you to carry out that offer." What is there unlawful in that? You may surmise that it was fraudulent, but surmise is not enough. You must have some facts. There are no facts here which take the case out of the most ordinary transaction between a banker and his customer; advances made by the banker to the customer for the purpose of carrying on his business. Nor does the circumstance that, when reports had got abroad injurious to the credit of *Softley*, and applications were made to him for pay-

C. J. B. 1875 *Ex parte* HODGKIN. *In re* SOFTLEY.

ment which he communicated to the bankers, they said, "Send the creditors to us," and then made some statements as to his credit, affect the question. Whatever statement they made, it is not reasonable to believe that it was calculated to mislead the creditors unless it was untrue in itself. If the bankers had simply said to the creditors, "We have trusted him considerably, and we mean to trust him more; we do not think he is going to fail," there would be nothing improper in that. Nor can I perceive in the whole of the narrative any single fact on which I can with justice rest a suspicion that the bankers at any time tried to do that which the law would not allow, or which was in point of law or morals wrong or unreasonable. Then comes the transaction upon which so much has been said. On the 7th of October the bankers say, "You have promised us a security, now give it us. You have mentioned the ship No. 111; deposit the builder's certificate of that ship with us. We close your account; we will make you no further advances, and we ask now for that security which you promised to give us." Looking to the language of the 92nd section, I must, in order to avoid that transaction, find that it was a voluntary act on the part of the debtor. I can readily find, and I do not hesitate to conclude, that he had not the means of paying his debts with his own moneys; but I must also find that he acted perfectly voluntarily, and with intent to prefer the bankers to his other creditors; and I must take care, moreover, that the transaction does not fall within the proviso at the end of the section which protects the bankers, if they were incumbrancers acting in good faith and for valuable consideration. Those conditions are, in my opinion, most fully performed, because I cannot see any want of good faith on the part of the bankers, nor any reason for suspecting it; and that there was a good consideration is proved.

Then it comes to this, whether the former promise is one which, according to the authorities, will sustain the subsequent transaction. The promise was plain. It is proved beyond all doubt that the offer was made, that it was not accepted at that time, but that it was intimated, "Whenever we call for it, you must perform the offer you have now made," and, upon the faith of that promise, the bankers go on making very large advances to the debtor to enable

C. J. B. 1875 *Ex parte* HODGKIN. *In re* SOFTLEY.

him to carry on his business up to the time when his failure took place. Is that within the 92nd section? If not, there is no case whatever. The learned Judge of the County Court has examined the case with the most scrupulous accuracy, and, acting upon the authorities to which he refers, and which cannot in any degree be gainsaid, has come to the conclusion that the promise was actually made, and that the performance of it was exacted by the bankers at the time mentioned in the evidence; and if it were proved far more clearly than it is (I admit that a great deal towards it is proved) that they knew that the debtor was then in failing circumstances, still, on the authority of the cases which have been referred to, they were not precluded from insisting on the performance of that promise on which they had acted for several months since it was made.

Now, that is the whole case; and unless I were to hold that, when the bankers, having a security offered to them, say, "We will not have it now, but the time may come when we will call upon you for it"—unless I were to hold that that is an evasion of the law, an illegal transaction, fraudulent against the other creditors, I can find no fault with the transaction. If I were so to decide I should be doing so for the first time, because, although I admit that the distinctions in some of the cases are in no small degree embarrassing, yet upon the plain facts of this case, in my opinion, no jury could come to any other conclusion than this, that the security was given in pursuance of a former promise which had been acted upon by the bankers, and which the debtor was ready to fulfil, and that it was not done with any intent to prefer them to his other creditors. The intention must be referred, as the Lord Chief Justice said in *Bills* v. *Smith* (1), to an actual obligation, an undertaking which the debtor had given, and which he was peremptorily called upon to fulfil. In that I can see nothing in the slightest degree unlawful, nor can I refer it to any motive actuating the debtor to prefer one creditor to another. He seems to have been in a sort of despair how he was to pay his debt; he knew he was bound by the obligation he had come under to give the security. But then the security is challenged, and it is said that either the *Bills of Sale Act*, or the *Merchant Shipping Act*,

(1) 6 B. & S. 314.

C. J. B. 1875 *Ex parte* HOLDGKIN. *In re* SOFTLEY.

forms an objection to its validity. I cannot see that there is the slightest ground for saying that either Act affects it. Whether this thing was a ship or not, although I know not by what other name it could be called, it was the property of the debtor, and it was, to the full extent of his interest, pledged and mortgaged by him. A more absolute form of pledge cannot be conceived than this certificate, by which, under his hand, he declares that he has built the ship for *John Scott*, and that *John Scott* is the owner of it. I cannot conceive a more absolute transfer of property than that document contains. From the moment it was signed the property in the ship would be in *John Scott*, by the acknowledgment of the man who had built her, and after that she was *John Scott's* ship, to be dealt with as he thought fit. He dealt with her thus:—He took actual possession of her—that he put his name on her does not make any sort of difference, but he took actual possession—and I should like to know upon what ground his possession could be disputed. As I read the certificate, stating him to be the sole owner, he took possession of nothing which belonged to *Softley*, nothing was left in *Softley's* order or disposition, but with the certificate in his hand *Scott* took possession of and wrote his name upon the ship.

In my opinion, the order appealed against is quite right on every ground. The only doubt I have entertained during the discussion is as to the further advance of £770 made upon the assignment of *Avery's* debt, and upon that I follow the judgment as I read it, for I cannot read the words of the order in any other sense than this. Upon that day, when insolvency was avowed by the debtor, and notorious to the bankers, they exact from him an assignment of *Avery's* debt upon consideration that they will advance him £770. To the extent of the £770 the assignment of the debt is, in my opinion, a good security to the bankers, because there was a perfect equivalent given for it. It does not prefer them in any way to the other creditors; it places them only in the situation of the bankrupt, who received the whole of the £770 in full. But beyond that, notwithstanding the terms of the assignment, it is no security at all, and it cannot be held as against the trustee in the liquidation. It is a security for £770 only, and so I consider that the learned Judge has decided.

Beyond that I cannot perceive, either in the terms of his order as it is drawn up, or in his judgment which has been read to me, any authority for saying that the bankers are at liberty to place the proceeds of the assignment against their general debt, or to take more of those proceeds than will reimburse them the £770 which they have advanced. With these observations, all I can do is to dismiss the appeal. If it is necessary to insert any words in the order, limiting the interest which the bankers take under the assignment of *Avery's* debt to £770, I shall be very willing to introduce them. Considering the difficulties of the case, and the fact that the decisions are by no means so clear as one would like to find them, as affecting transactions of a class very frequent among all men of business in the commercial world, I do not think I ought to make the Appellant pay the costs of this appeal.

Mr. *De Gex*:—We shall be entitled to consolidate our two securities, and they must redeem both or neither.

SIR JAMES BACON, C.J.:—Certainly not. Out of what you may receive from *Avery's* debt, you are entitled to take £770, and no more. By no tacking or other magical operation can you mix up the two securities. Otherwise, sect. 92 would clearly apply, and there would be a preference of one creditor over the others.

Solicitor for the Trustee: Mr. *S. R. Hoyle,* agent for Messrs. *Hoyle, Shipley, & Hoyle, Newcastle.*

Solicitors for the Bankers: Messrs. *Waterhouse & Winterbotham,* agents for Messrs. *J. & R. S. Watson, Newcastle.*

Solicitor for *Marshall & Co.*: Mr. *G. B. Wheeler,* agent for Mr. *H. S. Sewell, Newcastle.*

C. J. B.

1875

July 12.

## *Ex parte* MACKENZIE. *In re* HELLIWELL.

*Consolidation of Proceedings—Joint and Separate Bankruptcy Petitions—Adjudication under the Joint Petition only—Locus Standi of Bankrupt to oppose Consolidation—Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *ss.* 80 (*sub-s.* 2), 102—*Bankruptcy Rules*, 1870, *r.* 48.

An adjudication of bankruptcy was made upon a petition presented against two partners in trade. A petition had been previously presented by the same creditor against one of the partners separately, and some proceedings had been taken under it, but no adjudication had been made:—

*Held*, that there was power to order the proceedings under the separate petition to be consolidated with those under the joint petition:

*Held*, also, that the bankrupt had no *locus standi* to oppose the consolidation.

THIS was an appeal from a decision of the Judge of the *Halifax* County Court.

In May, 1874, *Ralph Helliwell*, an ironmonger at *Halifax*, filed a liquidation petition in the *Halifax* County Court. In it he described himself as a sole trader, trading under the firm of *R. Horsfall & Co.* One of the creditors mentioned in his statement of affairs was *Elizabeth Horsfall*, for a debt of £676. The first meeting of the creditors was held on the 28th of May, 1874, and it was then resolved by the proper majority to accept a composition of 10*s.* in the pound, payable in three instalments, the last of which was to be guaranteed by Mrs. *Horsfall*. At this meeting she proved a debt of £676. This resolution was duly confirmed at the second meeting of the creditors. *Donald Mackenzie*, a dissentient creditor, having received information that Mrs. *Horsfall* was in fact a partner with *Helliwell* in his business, applied to the Court for an order for the examination of *Helliwell* and Mrs. *Horsfall*, on the ground that the resolutions had been passed by fraud. This application was granted, and they were examined on the 15th of March, 1875, and it appeared that there had been a partnership between them in the business, a formal deed of partnership having been executed. Thereupon *Mackenzie*, on the 22nd of March, presented a petition for adjudication of bank-

C. J. B.
1875
*Ex parte* MACKENZIE.
*In re* HELLIWELL.

ruptcy against *Helliwell* under the last clause (1) of sect. 126 of the *Bankruptcy Act*, 1869. A receiver was at once appointed, and orders were made restraining some creditors from levying execution against the debtor's property.

The 13th of April was appointed for the hearing of this petition, and *Helliwell* and Mrs. *Horsfall* and other persons were subpœnaed as witnesses. Before that day arrived, *Mackenzie* issued a debtor's summons against *Helliwell* and Mrs. *Horsfall*, and by failing to comply with it they committed an act of bankruptcy. On the 13th of April, *Mackenzie* presented a petition for adjudication of bankruptcy against them jointly, founded on this act of bankruptcy. When, on the same day, the hearing of the separate petition was opened, one of the witnesses asked for an adjournment, in order that he might obtain the assistance of counsel, and an order adjourning the hearing to the 11th of May was made. The solicitor of *Helliwell* and Mrs. *Horsfall* then expressed his readiness to consent to a joint adjudication being at once made against them, and an adjudication was made accordingly. The first meeting of the creditors under the joint petition was held on the 10th of May, and a trustee was appointed. The creditors also resolved to transfer the proceedings under this petition to the *Birmingham* County Court. On the 11th of May, the adjourned hearing of the separate petition took place, and an application was made on behalf of the petitioner that the separate petition, and all the proceedings thereunder, might be annexed to, and consolidated and amalgamated with, the joint petition. The trustee consented to this application, but it was opposed by *Helliwell*. The Judge made an order dismissing the separate petition, and refusing the application to consolidate the proceedings. *Mackenzie* appealed.

Mr. *Winslow*, Q.C., and Mr. *Henderson*, for the Appellant:—

The separate petition was necessary, because otherwise the composition resolutions would have been an answer, as far as *Helliwell* was concerned, to the debtor's summons. The Court has power to

(1) The last clause of sect. 126 provides:—"If it appear to the Court, on satisfactory evidence, that a composition under this section cannot, in consequence of legal difficulties, or for any sufficient cause, proceed without injustice or undue delay to the creditors or to the debtor, the Court may adjudge the debtor a bankrupt, and proceedings may be had accordingly."

C. J. B. 1875 *Ex parte* MACKENZIE. *In re* HELLIWELL.

order the consolidation, notwithstanding the fact that there has been no adjudication under the separate petition: *Bankruptcy Act*, 1869, sect. 80, sub-sect. 2, sect. 102 (1).

[The CHIEF JUDGE:—Under the old practice an order for consolidation would not have been made till after adjudication. What is the object of having a consolidation in this case? A joint adjudication gives the creditors every possible right against the partners, and either of them.]

The trustee wishes to avail himself of the proceedings which have been had under the separate petition. The file of proceedings, if it is not transferred to the *Birmingham* Court, can only be got at by means of a *subpœna duces tecum*.

The bankrupt has no right to oppose the application; he has no interest in the matter: *Ex parte Lister* (2).

Mr. *R. H. Collins*, for *Helliwell*:—

This is a matter for the discretion of the Judge, and the Court of Appeal will not interfere. But there is no reason for making the order, as a separate adjudication is unnecessary. Moreover Rule 48 of the *Bankruptcy Rules*, 1870 (3), applies, and shews that the separate petition was rightly dismissed.

(1) Sect. 80, sub-sect. 2:—"Where two or more bankruptcy petitions are presented against the same debtor, or against debtors being members of the same partnership, the Court may consolidate the proceedings, or any of them, upon such terms as the Court thinks fit."

Sect. 102: "Where one member of a partnership has been adjudicated a bankrupt, any other petition for adjudication against a member of the same partnership shall be filed in or transferred to the Court in which the first-mentioned petition is in course of prosecution, and, unless the Court otherwise directs, the property of such last-mentioned member shall vest in the trustee appointed in respect of the property of the first-mentioned member of the partnership, and the Court may give such directions for amalgamating the proceedings in respect of the properties of the members of the same partnership as it thinks just."

(2) Mont. & Ch. 260.

(3) Rule 48: "Where two or more petitions are presented to the same Court against the same debtor, or against debtors being members of the same partnership, the petition which was first presented shall be first heard; and where such first petition shall not have been served, or where the debtor shews cause against the petition, or where delay will be avoided, any other petition which has been served may be heard, and if the Court make adjudication thereon, the Court shall, after the expiration of the time allowed for appeal against the adjudication, dismiss all the other petitions upon such terms as to costs as it shall deem just."

SIR JAMES BACON, C.J.:—

It is said that this is a matter only for the exercise of the discretion of the Judge, but, if so, that discretion must be exercised upon the facts before him. By the affidavit of Mr. *Hodgson* it appears that a variety of proceedings were taken under the separate petition which concerned the creditors very much. This affidavit is not referred to in the order, and there is nothing to shew that the Judge took these facts into consideration. If it be proper that the conduct of the bankrupt should be inquired into, the matter ceases to be one of discretion, and becomes one of right. Rule 48 does not stand in the way of the consolidation asked for; it applies to a totally different state of circumstances. Under it the Court has power to suppress a wholly unnecessary petition. In the present case it is not disputed that there are facts into which it may be the duty of the Court to inquire. The proceedings under the joint petition must go on in the *Birmingham* Court; and I think the two petitions ought to be consolidated in order that the trustee under the joint petition may be able properly to exercise all his legal rights.

I have heard the bankrupt because he has been served with notice of the appeal. I do not know why this should have been done. He has no right to oppose the application; the matter is one which concerns his trustee only. The order of the County Court must be discharged, so far as it dismisses the separate petition, and an order must be made to consolidate the proceedings.

Solicitor for the Appellant: Mr. *A. H. Miller*, agent for Mr. *C. B. Hodgson, Birmingham.*

Solicitors for the Bankrupt: Messrs. *Bower & Cotton*, agents for Mr. *F. Jubb, Halifax.*

C. J. B.
1875
July 19.

## *Ex parte* COOPER. *In re* BAILLIE.

*Petitioning Creditor's Debt—Equitable Assignee of Debt—Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *s.* 6.

The equitable assignee of a debt can present a bankruptcy petition against the debtor without joining the assignor as a co-petitioner.

A PETITION for adjudication of bankruptcy against *W. M. Baillie*, was presented by *J. R. Cooper*. The Petition stated that *Baillie* was indebted to the Petitioner in the sum of £5000, as assignee of a debt of that amount due from *Baillie* to another person. The assignor did not join in the Petition, and he refused to do so. He, however, joined with the Petitioner in an affidavit, from which it appeared that the £5000 was lent to *Baillie* in June, 1873, and that in February, 1875, the debt was assigned by the lender to *Cooper*. Mr. Registrar *Pepys* doubted whether the assignee had a right to present the Petition without joining the assignor as co-Petitioner, and he referred the matter to the Chief Judge.

Mr. *Winslow*, Q.C., for the Petitioner:—

Formerly, no doubt, a mere equitable assignee of a debt could not petition in bankruptcy against the debtor; the assignor must have joined in the Petition. But this is altered by the Act of 1869, sect. 6 of which provides that "the debt of the petitioning creditor must be a liquidated sum due at law or in equity." Formerly the debt must have been one due at law and in equity. The alteration has been made deliberately with the view of meeting such a case as the present, where the assignor refuses to join in the Petition.

Sir James Bacon, C.J.:—

In equity the assignee is the person to whom the debt is due, and he could sue for it either in the name of the assignor or in his own. I think that the assignee is entitled to present the Petition alone.

Solicitors: Messrs. *Linklater & Co.*

## *Ex parte* READER. *In re* WRIGLEY.

C. J. B.
1875
July 19.

*Fraudulent Preference—Pressure—Trial by Jury—Application for New Trial —Time—Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *s.* 92—*Bankruptcy Rules*, 1870, *r.* 140.

A creditor suggested to his debtor that the latter should buy goods on credit from other persons, and should with the proceeds of their sale pay off the debt due to the former. The debtor adopted the suggestion, and out of the proceeds of the sale of goods which he obtained on credit he made several payments on account of the debt. There was evidence that the payments were made under pressure from the creditor. The debtor afterwards filed a liquidation petition:—

*Held*, that, as the transaction was fraudulent in its inception, it was immaterial that the payments were made under pressure, but that they must be set aside as being fraudulent preferences.

Where a jury have found a verdict on an issue of fact, but no order consequent thereon has been made by the Judge, it is not necessary that an application for a new trial should be made within twenty-one days from the finding.

Rule 143 of the *Bankruptcy Rules*, 1870, does not apply to such a case, either directly or by analogy.

THIS was an appeal from a decision of the Judge of the *Oldham* County Court.

*Samuel Wrigley* was a cotton-spinner at *Oldham*. He commenced business there in January, 1873. He took a lease of a mill and purchased the machinery in it for £4750; of this sum he paid only £600, and to secure the payment of the balance he gave the vendors a bill of sale of the machinery. On the 15th of January, 1873, he entered into an agreement in writing with Messrs. *Reader & Charney*, cotton brokers at *Liverpool*, by which, in consideration of their making advances to him to the extent of £1000, he agreed to allow them to charge a profit of three-sixteenths of a penny per pound on the net weight of all cotton used in his mill (in addition to the ordinary brokerage charges and 5 per cent. interest); also to instruct the buyers of his yarn to pay their purchase-money to *Reader & Charney*, and, in the event of his collecting any of the accounts himself, he engaged immediately to pay the same to them. He was also to permit them to have access

C. J. B. 1875 *Ex parte* READER. *In re* WRIGLEY.

to the books of the mill whenever required, and to furnish them with an account of all deliveries of yarn, with buyer's name, on the day of delivery, and to render a monthly account of all waste and fly bought by him. When this agreement was entered into *Reader & Charney* knew that he had not paid the whole purchase-money for the machinery, but they did not know until the following May that he had given any bill of sale of the machinery. They had advanced him £300 before the agreement was signed, and they continued afterwards to make him considerable advances, both in money and cotton, until the beginning of July, 1873. He did not, however, properly carry out the terms of the agreement, and he failed to supply them with the monthly accounts. At the beginning of July, 1873, upwards of £2000 was due to them. At the end of June a person named *Miles Crompton* was, at the instance of *Reader & Charney*, appointed bookkeeper to *Wrigley*, and they paid a part of his salary. After his appointment *Crompton* was in the habit of keeping them regularly informed of the state of *Wrigley's* affairs. On the 4th of July *Charney* met *Wrigley* on the *Manchester Exchange*, and told him that his firm would not make him any more advances. *Charney* also said to him, "You must try to pay us up. Do with other people as you have done with us; we have given you four months; you must get as long credit elsewhere." On the 4th of July, *Crompton*, on behalf of *Wrigley*, had written to *Reader & Charney* asking them to send at once a large quantity of cotton, and on the 5th of July they wrote to *Wrigley* as follows:—"In reply to yours of yesterday, we wired you, as agreed upon; buy what you require in *Oldham*. This is in accordance with the arrangement between you and our Mr. *Charney* made in *Manchester* yesterday. Of course you will see to getting as long credit as you can, and buy only from those who are willing to let you have credit, as we are very anxious to get our account." After this *Reader & Charney* made no further advances to *Wrigley*, with the exception of a sum of £60 which they provided to enable him to pay his workmen's wages. He purchased a large quantity of cotton from other firms on credit, and with the proceeds of its sale he made payments to *Reader & Charney* to the amount of £1200. On the 3rd of October, 1873, he filed a liquidation petition. At that time he still owed them nearly £1200. The trustee under the liquidation sought to recover from *Reader & Charney* the

C. J. B.
1875
*Ex parte* READER.
*In re* WRIGLEY.

£1200 which they had received, on the ground that the payments amounted to fraudulent preferences. To determine the question, an issue was directed to be tried by a jury on the 16th of May, 1875, the trustee being Plaintiff and *Reader & Charney* Defendants. At the trial *Wrigley* was examined as a witness, and in the course of his evidence he said, "I was pressed for payment, and I was pressed too much. I said once I could not pay more than £100 a week. That was about August. On the 22nd May the Defendants pressed for a substantial security." The jury found a verdict for the Defendants.

On the 12th of June the trustee gave notice of an application to the County Court for an order directing that the verdict should be set aside and a new trial had, on the ground that the verdict was against the evidence. No order consequent upon the verdict had been made by the Judge. On the 18th of June the Judge ordered that a new trial should take place on the 22nd of July. From this order *Reader & Charney* appealed.

Mr. *Jordan*, for the Appellants:—

I say, first, that the application was made too late. It has been held that, by analogy to rule 143 of the *Bankruptcy Rules*, 1870, which fixes twenty-one days as the time within which an appeal must be brought, an application for a rehearing ought generally to be made within the same period: *Ex parte Brown* (1). I contend that the same analogy holds good with regard to an application for a new trial, and here the application was not made till thirty-three days after the verdict was given.

But, upon the evidence, I contend that the verdict was right. What *Charney* said to *Wrigley* merely came to this: "You have deceived us, and we won't trust you any more. If you want credit, you must get it elsewhere. But you must pay us our debt." It was not intended as an invitation to commit a fraud. It is clear that the subsequent payments were made under pressure, and that is enough to support them: *Smith* v. *Timms* (2); *Ex parte Tempest* (3).

Mr. *Little*, Q.C., and Mr. *S. Taylor*, for the trustee, were not called on.

(1) Law Rep. 9 Ch. 304.
(2) 1 H. & C. 849.
(3) Law Rep. 6 Ch. 70.

C. J. B. 1875 *Ex parte* READER. *In re* WRIGLEY.

SIR JAMES BACON, C.J.:—

Mr. *Jordan* has taken two points. He says, first, that the appeal is not in time. In my opinion it is in perfectly good time. The twenty-one days mentioned in Rule 143 refer to an appeal from an order of the Court. The observations made in *Ex parte Brown* (1) might apply to a case in which there had been an order made, but there has been no order in this case. The learned Judge, for his own satisfaction, directed that there should be a trial before a jury. That he was greatly dissatisfied with the verdict given is quite clear, for on the application made by Mr. *Little's* client he directed that there should be a new trial. The verdict of the jury was not conclusive to his mind. It was for him to adopt it or to direct a new trial, whichever he thought fit. He had made no order, and there is no point of time from which you can measure the period of twenty-one days. It is a matter purely within the discretion of the Court. The objection on the point of time, in my opinion, wholly fails.

With regard to the other point, a more suspicious case cannot well be imagined. As I have already said, the learned Judge was clearly dissatisfied with the verdict of the jury, and I do not see how he could do otherwise than direct a new trial. Under the circumstances, the fact that there was pressure before the payments were made is immaterial. [His Lordship read sect. 92.]

Where was the good faith on the part of the payees? It is not denied that, however ill this man had behaved to Messrs. *Reader & Charney*, however much he had falsified his returns, however much he had broken his agreement with them, *Charney* met him on the *Exchange*, and said to him in effect: "You are in a failing condition. You owe us money, and you cannot pay us. Go and rob" —I was going to say, and I do not think it is too strong an expression—"go and cheat somebody else, and with the proceeds of your cheating pay us." And these are the creditors who contend that the transaction was in good faith. I think that, on the evidence, the verdict cannot stand, and there must be a new trial.

Solicitors: Messrs. *Chester, Urquhart, & Co.*, agents for Messrs. *Dawson & Scowcroft, Bolton;* Mr. *J. W. Mellor, Oldham.*

(1) Law Rep. 9 Ch. 304.

## *Ex parte* DICKIN. *In re* FOSTER.

C. J. B.
1875
July 23.

*Joint and Separate Estates—Declaration of Dividends—Application for Declaration of Dividend on Joint Estate before Separate Estate—Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *s.* 104—*Creditor holding Security on Separate Estate for Joint and Separate Debts—Right to appropriate Produce of Security—Proof.*

A creditor of two partners was also a creditor of one of the partners separately, and the title-deeds of separate estate of that partner were deposited with him to secure both the joint and the separate debts. The two partners filed a joint liquidation petition, and the partner whose separate estate was mortgaged also filed a separate liquidation petition. The security having been realized:—

*Held*, that the creditor was entitled to apportion the produce of the realization between his joint and separate debts in whatever way was most for his advantage, and that, to enable him to exercise this option, he was entitled to apply to the Court, under sect. 104 of the *Bankruptcy Act*, 1869, to have a dividend on the joint estate declared before the declaration of a dividend on the separate estate.

THIS was an appeal from a decision of the Judge of the *Bradford* County Court.

*John Foster* and *W. R. Hinings* were partners in trade. *Foster* also carried on a separate business of his own. The firm kept a banking account with the *Bradford Banking Company*, and *Foster* also kept a separate account with the company. *Hinings* did not keep any separate account. In 1871 *Hinings* deposited with the bank the title-deeds of some separate property belonging to him, to secure the balance then due, or which might become due, from the firm to the bank. On the 31st of October, 1873, *Foster* deposited with the bank the title-deeds of some separate property of his, giving them at the same time a memorandum in writing, by which he covenanted with their trustees that the deeds, and the property to which they related, should be a security for the balance of account then due, or which might thereafter become due, to the company from him, either alone or together with any other person or persons with whom he was or might be in partnership; and he covenanted also to execute a legal mortgage of the property to the company when required by them.

C. J. B.
1875
*Ex parte* DICKIN.
*In re* FOSTER.

In 1874 *Foster* and *Hinings* filed a liquidation petition, and *Foster* on the same day filed a separate petition. On the 23rd of May, 1874, the joint creditors resolved on a liquidation by arrangement, and appointed *Henry Dickin* trustee. The separate creditors of *Foster* also resolved on a liquidation, and appointed the same trustee. At the commencement of the liquidation the debt due to the bank from the firm was £13,602 4*s.* 7*d.*, and the separate debt due from *Foster* was £4458 10*s.* 7*d.* The bank proved against the joint estate for the full amount of their debt, not deducting anything in respect of their securities, as they did not affect the joint estate. The securities were afterwards realized, with the concurrence of the trustee, without any actual order for sale being made under Rule 78 of the *Bankruptcy Rules*, 1870. The security upon the separate estate of *Foster* produced £11,462 19*s.* 6*d.*, and that upon the separate estate of *Hinings* produced £1135, making together £12,597 19*s.* 6*d.*, which was not enough to pay the joint debt in full. The bank then tendered a proof against the separate estate of *Foster* for £1628 19*s.* 2*d.* This sum was arrived at by apportioning the £12,597 19*s.* 6*d.* derived from the securities between the joint and the separate debts, in the ratio which their amounts bore to each other, and deducting from the separate debt the sum thus apportioned to it, the proof tendered being for the balance. The trustee rejected the proof, on the ground that the security on *Foster's* estate ought to have been applied in the first instance in paying in full the separate debt. Application was then made by the bank to the County Court. The Judge was of opinion that the proof had been improperly rejected *in toto*. He thought that the bank were entitled to apply the sum realized from the securities in paying the two debts in whatever way they chose. But he was of opinion that they could not properly exercise their option until a dividend had been declared on the joint estate. None had been declared on either estate. He, therefore, on the 4th of June, 1875, ordered that the application, so far as it related to the sum for which the bank were entitled to prove against the separate estate of *Foster*, should stand over until they should have made such application to the Court as they might be advised with reference to the declaration of a dividend on the joint estate. The bank then applied to the Court, under sect. 104 of the *Bankruptcy*

*Act*, 1869, for an order directing the trustee to declare a dividend on the joint estate, prior to and separately from a dividend on the separate estate. The Judge was of opinion that the bank were entitled to have such an order made, but as it was stated to him that the trustee intended to appeal from the order of the 4th of June, he ordered that the hearing of the second application should stand over to await the hearing of the appeal from the first order. The second order was dated the 8th of June. The trustee appealed from both orders.

Mr. *Winslow*, Q.C., and Mr. *C. E. Jones*, for the Appellant :—

The bank wish to keep the produce of their securities, and to prove against the joint estate for the full amount of the joint debt, and also against the separate estate for the full amount of the separate debt. They cannot do this. They must apply what they have received in reduction either of the joint debt or of the separate debt. Moreover, an application to the Court, under sect. 104 (1), cannot be made by one single creditor. It can only be made by a class of creditors, as, for instance, if the trustee had a large sum in hand on account of the joint estate, and scarcely anything had been realized from the separate estate, the joint creditors might apply to have a dividend on the joint estate declared.

Mr. *De Gex*, Q.C., and Mr. *Bagley*, for the bank, were not called upon.

SIR JAMES BACON, C.J. :—

I think that no reasonable objection can be taken to the order which the learned Judge has made. He has, as might have been expected, given the most deliberate attention to the case.

The case is not incumbered by any sort of difficulty. Nothing is more clear than the law upon this subject, that a creditor who has a security which he has a right to apply to one or other of two debts due to him, can exercise that right in any way he thinks fit.

(1) Sect. 104 provides: "Where joint and separate properties are being administered, dividends of the joint and separate properties shall, subject to any order to the contrary that may be made by the Court on the application of any person interested, be declared together."

C. J. B. 1875 *Ex parte* DICKIN. *In re* FOSTER.

Here the bankers have that right, the right to apply the proceeds of their security in paying the two debts in any way they think fit. To save expense the trustee, without any formal order for sale, at once consented to the realization of the securities. It was much more than consent, he was a party to the realization of the securities, and without his positive act the realization could not have taken place.

Well, then, as the right to an option on the part of the bank is too clear to be questioned, can there be any impropriety in the learned Judge saying, "You come here to prove for £1628; you arrive at that sum by an appropriation which you have made, and which you think a fair appropriation, of the securities between the two debts. You had no right to make that particular appropriation, and I cannot authorize it; but that you will be entitled to prove for something on the separate estate is quite clear, and therefore the trustee's wholesale rejection of your claim to prove is wrong. But, until a dividend on the joint estate is declared, you cannot properly exercise the right or the option which the law confers upon you, and therefore I will make no order as to the sum for which you may be entitled to prove until a dividend has been declared upon the joint estate." Can anything be more proper, rational, and considerate, having regard to the creditors' interests, than that mode of dealing with the matter? I quite concur in every word which the Judge of the County Court has used in delivering his judgment. Can it be said that he is not at liberty, finding the matter not at present clear and ripe for decision, to adjourn the case? It is plainly within his discretion to order an adjournment, but having, as he felt himself bound to do, pronounced a decision which involved the rights of the parties, and understanding that his decision was to be appealed from, he postponed the making of any further order until an application should be made for the declaration of a dividend. The day arrived which he had appointed for that application. It is an application under the 104th section, and it is said that that 104th section does not give the Judge power to make the order which he has made. Upon this second occasion, when the application was made under the 104th section, the Judge took pains to give reasons why he thought he had a discretionary power, and why the interests of the

parties and the justice of the case required that he should exercise that power. It might happen that the joint estate would be easily realized, and that the separate estate could not be realized for a long period, or it might be just the other way. But this is the power vested in the Court by the 104th section, that, taking the facts and the interests of the creditors into consideration, the Court shall have power, if necessary, not to declare the dividends together, as would be done in an ordinary case.

In my opinion the Judge acted with the most perfect reason, and with strict regard to the true interests of the creditors, in postponing the order asked for on the second occasion until the appeal which was announced as about to be brought from his first order should have been heard. The first appeal, in my opinion, wholly fails.

The second appeal is unreasonable, because the order merely directed an adjournment, which the Court had full power to make, until after the appeal from the first order was decided. Both orders are, in my opinion, perfectly right. No order as to the declaration of dividends is yet made. When the application is renewed after the period of adjournment has elapsed, the Judge will do as he thinks fit with regard to the declaration of a dividend upon the joint estate; and it is clear in point of fact that the bankers cannot exercise their option, and cannot know the extent of their legal right, until that dividend has been declared. Both appeals entirely fail. They will be dismissed, but the costs of one appeal only will be allowed to the Respondents.

Solicitors for the Trustee: Messrs. *Layton & Jaques*, agents for Messrs. *Watson & Dickons, Bradford.*

Solicitors for the Bankers: Messrs. *Paterson, Snow, & Burney*, agents for Mr. *W. Gardiner, Bradford.*

C. J. B.

1875

July 23.

## *Ex parte* MIRABITA. *In re* DALE.

*Composition—Enforcing Provisions—Surety—Jurisdiction—Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *s.* 126.

The Court of Bankruptcy has no jurisdiction to enforce the payment of a composition by a surety who has covenanted with a trustee on behalf of the creditors for its payment.

If the surety fails to pay, it is the duty of the trustee to sue him at law on his covenant; and if the trustee neglects this duty, the Court of Bankruptcy has power to compel him to perform it.

THIS was an appeal from a decision of the Judge of the *Newcastle-on-Tyne* County Court.

*G. D. Dale*, a shipbroker at *North Shields*, filed a liquidation petition. On the 7th of August, 1874, the creditors resolved to accept a composition of 6*s.* 8*d.* in the pound in satisfaction of their debts, the composition to be payable in three instalments, viz., 3*s.* three months after the registration of the resolutions, 3*s.* six months afterwards, and 8*d.* twelve months afterwards. The first two instalments were to be secured in such manner as the committee of inspection should approve. A committee of inspection consisting of four creditors was appointed, and *G. Monkhouse* was appointed trustee. The resolutions were duly confirmed at the second meeting, on the 18th of August, and were registered. On the 18th of September, 1874, a deed was executed to carry out this arrangement. The deed was made between *Dale* of the first part, *J. W. Fenwick* (described as the surety) of the second part, the committee of inspection of the third part, and the trustee of the fourth part. By this deed the debtor and the surety jointly and severally covenanted with the trustee to pay to him the first and second instalments of the composition at the appointed times, and the debtor alone covenanted to pay the third instalment; and it was declared that the trustee should hold the instalments when received on trust for distribution among the creditors. The instalments were not paid when they became due to *G. Mirabita*, one of the creditors. He applied to the County Court for an order that the provisions of the composition might be enforced by the

C. J. B.
1875
*Ex parte* MIRABITA.
*In re* DALE.

Court, and that the debtor and the trustee, or one of them, might be ordered forthwith to pay to *Mirabita* the instalments due to him, and that, in default of payment by *Dale*, *Fenwick*, as the surety, might be ordered to pay the instalments, or that such further or other order for the enforcing of the composition might be made as the Court might think fit. The Judge dismissed the application as against the trustee and the surety, and ordered that the debtor should pay the instalments within fourteen days. *Mirabita* appealed.

Mr. *De Gex*, Q.C., and Mr. *Finlay Knight*, for the Appellant:—

The Court has jurisdiction under sect. 126 of the *Bankruptcy Act*, 1869 (1), to enforce the provisions of the composition, and this jurisdiction extends to the surety. Though, no doubt, upon the failure to pay the composition, the right to sue for the original debt is revived, *Edwards* v. *Coombe* (2), yet in that case Mr. Justice *Willes* said (3): "A remedy is given in that Court [of Bankruptcy] which may be very valuable,—for instance, as respects parties coming in as sureties under the 280th rule." In *Ex parte Waterer* (4) Lord Justice *Mellish* said: "Was not the creditor's proper course to apply in bankruptcy for an order on the trustee to pay over to him the amount of his composition?" This assumes that the jurisdiction is not confined to the debtor; and the same thing was taken for granted in *Ex parte Sydney* (5) and in *Ex parte Botting* (6).

Mr. *Doria*, for the surety, was not called upon.

SIR JAMES BACON, C.J.:—

This question depends solely upon the construction of the Act; there is no other law bearing upon it. The enactment of sect. 126

(1) Sect. 126 provides: "The provisions of any composition made in pursuance of this section may be enforced by the Court on a motion made in a summary manner by any person interested, and any disobedience of the order of the Court made on such motion shall be deemed to be a contempt of Court."

(2) Law Rep. 7 C. P. 519.

(3) Ibid. 523.

(4) 22 W. R. 426.

(5) Law Rep. 10 Ch. 208.

(6) Law Rep. 19 Eq. 261.

C. J. B. 1875 *Ex parte* MIRABITA. *In re* DALE.

is a very plain one: the provisions of a composition may be enforced by the Court of Bankruptcy. But that provision does not extend to a surety. In *Edwards* v. *Coombe* there are observations of Mr. Justice *Willes* which point the other way from those which Mr. *De Gex* has read to me. That learned Judge says (1): "Suppose the creditors enter into a resolution for a composition, to be secured by the promissory notes of *A.* and *B.* within a given time, and that condition not complied with, the creditors would seek in vain for a remedy in the Court of Bankruptcy, that Court having no jurisdiction over *A.* and *B.*" The Court has power to enforce the payment of the composition by the debtor, and by the trustee if he has in his hands the money with which to pay it; though of course he cannot be compelled to pay it out of his own pocket. If the composition is not paid when it becomes due, it is his duty to sue the surety at law upon his covenant. Application should be made to the trustee to do this, and if he refuses, the Court can compel him to discharge his duty. I think that the application against the surety is wholly without authority, and entirely contrary to principle. A man who becomes surety for his friend for the payment of a composition does not by so doing make himself subject to the jurisdiction of the Court of Bankruptcy. There is no necessity for resorting to this extraordinary proceeding. The order of the County Court was right, and the appeal must be dismissed, but without costs.

Solicitors for the Creditor: Messrs. *Stocken & Jupp.*

Solicitors for the Surety: Messrs. *Stibbard & Cronshey*, agents for Messrs. *Adamson & Adamson, North Shields.*

(1) Law Rep. 7 C. P. 521.

## *Ex parte* STAFF. *In re* STAFF.

C. J. B.
1875
July 26.

*Liquidation—Registration of Resolutions—Small Amount of Assets—Abuse of Procedure of Court—Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *s.* 125—*Bankruptcy Rules*, 1870, *r.* 295.

The statement of a debtor who had filed a liquidation petition shewed that his debts amounted to £540, and that his assets were only £32. The creditors resolved upon a liquidation. One creditor opposed the registration of the resolutions:—

*Held*, that the petition was an abuse of the procedure of the Court, and that the registration had been rightly refused.

THIS was an appeal from a decision of the Judge of the *Oxford* County Court.

On the 27th of April, 1875, *H. J. Staff* filed a liquidation petition. His statement of affairs shewed that his debts amounted to £540 14*s.* 2*d.*, and that his assets were, cash balance at bankers, £2 8*s.* 2*d.*, and furniture valued at £30. The creditors mentioned in the debtor's list were all unsecured, and were five in number. One was the debtor's mother, for £100; another was his solicitor, for £19 8*s.* 2*d.*; and a third was Mr. *John Galpin*, the receiver in a Chancery suit of *Whiting* v. *Flower*, for £396. *Galpin's* debt was stated to be "disputed as for unliquidated damages on a contract still open." The debt arose in this way: A property called *The Elm Tree Brewery* was, under an order of the Court of Chancery, put up for sale by the receiver in the suit of *Whiting* v. *Flower* on the 3rd of March, 1875, and at this sale *Staff* became the purchaser for £440, and he paid a deposit of £44, leaving a balance of £396. The conditions of sale provided that the purchaser was to pay for the trade fixtures and plant at a valuation, that the balance of the purchase-money (including the amount of the valuation) was to be paid into Court on or before the 28th of April, and that the purchase was to be completed on the 8th of May. *Staff* failed to complete this contract. The first meeting of the creditors under the petition was held on the 15th of May. *Galpin* then tendered two proofs. The first was for £150, part of the £396. *Galpin* estimated the value of the brewery at £246,

C. J. B. 1875 *Ex parte* STAFF. *In re* STAFF.

and claimed a lien on it to that amount, and sought to prove for the balance. The second proof was for £50. He claimed £600 as due to him in respect of the value of the fixtures and damages for breach of contract, and he estimated the value of the fixtures at £550, and claimed a lien on them to that amount, and sought to prove for the balance of £50. Both these proofs were rejected by the chairman of the meeting, on the ground that they were for unliquidated damages arising out of a contract which the trustee, when appointed, might elect to adopt. The other creditors then resolved upon a liquidation by arrangement, and appointed a trustee and a committee of inspection. They also resolved to grant the debtor his discharge forthwith, and that the liquidation should be closed when the committee of inspection were satisfied that the whole of the debtor's assets had been got in, and the trustee's accounts had been audited and approved by them. The registration of the resolutions was opposed by *Galpin*, and the Registrar refused to register them, on the ground that *Galpin's* proof for £150 ought to have been admitted, and also that, inasmuch as there were practically no assets for distribution among the creditors, the resolutions to close the liquidation and discharge the debtor were opposed to the decision of the Lords Justices in *Ex parte Russell* (1). The Judge confirmed the Registrar's decision. *Staff* appealed.

Mr. *Finlay Knight*, for the Appellant:—

All the requirements of the Act and the Rules were complied with, and therefore the registration ought not to have been refused: *Ex parte Elworthy* (2); *Bankruptcy Rules*, 1870, r. 295. In *Ex parte Sir W. Russell* the creditors granted the debtor an immediate discharge, leaving him in possession of the whole of his half-pay as an officer in the army; and it was held that these resolutions were not binding on the dissentient creditors, because they must have been passed solely in the interest of the debtor. In the present case the debtor gives up to the creditors all that he has.

Mr. *Smart*, for *Galpin*, was not called on.

(1) Law Rep. 10 Ch. 255. (2) *Ante*, p. 742.

SIR JAMES BACON, C.J.:—

C. J. B.
1875
*Ex parte* STAFF.
*In re* STAFF.

This is a somewhat audacious appeal. Nothing is better settled than this—that the Court of Bankruptcy will not allow its procedure to be made use of for iniquitous or merely idle purposes. In my opinion both these elements exist in the present case. Moreover, most of the debts appear to be due to friendly creditors. But I base my decision on this, that the machinery of this Court ought not to be employed in a case where £32 is all the property which a debtor has to hand over to his creditors to satisfy debts amounting to £540. This Petition is a mere abuse of the procedure in bankruptcy, and the Registrar was quite right in refusing to register the resolutions. I dismiss the appeal with costs.

Solicitor for the Appellant: Mr. *C. Mallam*, agent for Messrs. *T. & G. Mallam, Oxford.*

Solicitors for the Respondent: Messrs. *Parker.*

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## *Ex parte* MARLAND. *In re* ASHTON.

C. J. B.
1875
*July* 26.

*Liquidation—Subsequent Adjudication of Bankruptcy by the Court—Method of Procedure—Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *s.* 125, *sub-s.* 12.

Under sect. 125, sub-sect. 12, of the *Bankruptcy Act*, 1869, the Court has power to adjudge a liquidating debtor a bankrupt *mero motú*, acting on the knowledge it has acquired in the course of the liquidation proceedings. It is not necessary that a bankruptcy petition should be presented.

THIS was an appeal from a decision of the Judge of the *Oldham* County Court.

On the 8th of January, 1875, *John Ashton*, a builder at *Hollinwood*, near *Manchester*, filed a liquidation petition. The first meeting of the creditors was held on the 25th of January, when it was resolved that the estate should be wound up by a liquidation by arrangement, and also that the estate should be sold forthwith to *John Marland* for the sum of 6*s.* in the pound on the debts of the creditors, to be paid to the trustees in two equal instalments at the expiration of four and seven months from the date of the reso-

C. J. B. 1875 *Ex parte* MARLAND. *In re* ASHTON.

lution. *Thomas Taylor* and *James Smith* were appointed trustees, and *T. W. Hardy* was appointed their solicitor. On the 3rd of February the resolutions were registered, with the exception of the resolution for the sale of the estate to *Marland*, which was struck out on the ground that it was *ultrà vires*. *Marland* proved for £7500, and he acted as chairman of the meeting. On the 31st of March another meeting of the creditors was convened by the trustees for the purpose of revoking the appointment of *Hardy* as solicitor and appointing some other solicitor, and of accepting the resignation of the trustees and appointing others. At this meeting *Marland* claimed to vote, but his vote was objected to on the ground that he was a partner with the debtor, and that the amount of his proof was incorrect. *Smith* resigned the office of trustee. Two sets of resolutions were signed. One set was signed by *Marland*, *Smith*, and *Hardy*, as proxy for some other creditors, adjourning the meeting, retaining *Hardy* as solicitor, and appointing a Mr. *Sumner* as trustee in place of *Smith*. The other set was signed by fourteen creditors, revoking the appointment of *Hardy* as solicitor, appointing Messrs. *Buckley & Clegg* as solicitors, accepting the resignation of *Smith*, and appointing *Taylor* sole trustee. On the hearing by the Judge of an application for the registration of the latter resolutions he ordered that the question of partnership between the debtor and *Marland* should be tried by a jury, and, if they found that there was no partnership, he referred it to the Registrar to ascertain the amount due from *Ashton* to *Marland*. The issue was tried on the 14th of June, and the jury stated that, in the absence of books on either side, and from the nature of the evidence before them, they found that there was no partnership. On the 18th of June application was made to the Judge by Mr. *Clegg*, as solicitor to the trustee, to take an account of what was due to *Marland*, and His Honour made the following order:—"Whereas it has appeared to me on satisfactory evidence, namely, on the evidence of the said liquidating debtor, *John Ashton*, and the said *John Marland*, that the said liquidation by arrangement cannot, in consequence of no proper accounts having been kept by either of the parties above mentioned, and in consequence of the untrustworthy character of the statements made and evidence given by them respectively on the occasion of the trial of an issue tried before

me between the said *John Marland* and the said *Thomas Taylor*, and in consequence of the discreditable nature of the dealings and transactions of the said *John Marland* and the said *John Ashton* with one another, proceed without injustice and undue delay to the other creditors of the said *John Ashton*: Now therefore I adjudge the said *John Ashton* a bankrupt, and direct that proceedings be had accordingly, and that such account be taken before the Registrar of this Court under the said bankruptcy." *Ashton* consented in writing to the adjudication being made, and attended the first meeting of creditors under it held on the 10th of July, when *Taylor* was appointed trustee. *Marland* appealed from the adjudication.

Mr. *Robson*, for the Appellant:—

The Court had no jurisdiction to make this adjudication under sect. 125, sub-sect. 12 (1) *mero motú*, without any application for the purpose. The creditors ought not to be deprived of the mode of administration which they have selected as the best. There was no legal or other difficulty in carrying on the liquidation; the only question was, who should be the trustee. If there was reason to suppose that *Marland's* proof had been improperly admitted, an application ought to have been made under Rule 73 of the *Bankruptcy Rules*, 1870, to have it expunged or reduced. At any rate, a petition for adjudication ought to have been presented in the ordinary way: *Ex parte James* (2).

Mr. *De Gex*, Q.C., and Mr. *Finlay Knight*, for the trustee, were not called on.

SIR JAMES BACON, C.J.:—

This application is founded on a total mistake as to the jurisdiction which is vested in the Court in the administration of a liquidation. If the Court finds that anything is going wrong, then sub-sect. 12

(1) Sect. 125, sub-sect. 12, provides: "If it appear to the Court on satisfactory evidence that the liquidation by arrangement cannot, in consequence of legal difficulties, or of there being no trustee for the time being, or for any sufficient cause, proceed without injustice or undue delay to the creditors or to the debtor, the Court may adjudge the debtor a bankrupt, and proceedings may be had accordingly."

(2) Law Rep. 9 Ch. 609, 615.

C. J. B. 1875 *Ex parte* MARLAND. *In re* ASHTON.

gives it power to set it right. The Court requires no petition to be presented if it, by reason of the knowledge which it possesses by means of the proceedings under the petition, is satisfied that justice requires that there should be a bankruptcy instead of a liquidation by arrangement. The adjudication takes no right away from the creditors. This order has been drawn with great care: and, upon the facts stated in it, the learned Judge, if he had made any other order, would, in my opinion, have been neglecting his duty. On none of the grounds which have been urged is the order wrong; on the contrary, I think that justice required that it should be made. The appeal must be dismissed with costs.

Solicitors for the Appellant: Messrs. *Phelps & Sidgwick*, agents for Mr. *T. W. Hardy, Manchester.*

Solicitors for the Trustee: Messrs. *Johnson & Weatheralls*, agents for Messrs. *Buckley & Clegg, Oldham.*

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C. J. B. 1875 *July* 26.

## *Ex parte* ROYLE. *In re* JOHNSON.

*Liquidation—Insufficient Estate—Costs—Priority of Payment—Receiver—Debtor's Solicitor.*

The costs of the receiver under a liquidation petition ought to be paid out of the estate in priority to the costs of the debtor's solicitor.

The first charge on the assets is for the costs of realizing them.

A trustee in a liquidation who had paid the costs of the debtor's solicitor out of the assets, which were insufficient to pay both those costs and the costs of the receiver, was ordered to pay the receiver's costs personally.

THIS was an appeal from a decision of the Judge of the *Manchester* County Court.

On the 27th of January, 1874, *William Johnson* and *Edward Johnson*, cotton-waste dealers at *Manchester*, filed a liquidation petition. On the same day *P. Royle* was appointed receiver of the property, and took possession. On the 16th of February the first meeting of the creditors was held. The creditors resolved on a liquidation by arrangement, and appointed *H. Kidson* and *Royle* trustees, with a qualification that *Kidson* was to be "the acting

trustee solely in the winding-up of the estate." *Kidson* realized the estate, which produced only £15 10*s*. Out of this sum he, in May, 1874, paid to Mr. *Clayton*, the debtor's solicitor, £12 10*s*., the taxed amount of his costs. On the 12th of November, 1874, *Royle* applied to *Kidson* to pay him £13 8*s*. 10*d*., the taxed amount of his costs as receiver, and £1 10*s*. which he had paid for rent. *Kidson* refused to pay more than £2 15*s*., the balance which he had in hand after deducting the £12 10*s*., and 5*s*. which he had himself expended in realizing the estate. *Royle* then applied to the Court for an order that *Kidson* should pay the sum demanded. The Judge refused the application, on the ground that *Royle* being a co-trustee could not sustain it. *Royle* appealed.

Mr. *De Gex*, Q.C., and Mr. *Finlay Knight*, for the Appellant:—

The receiver is entitled to be paid his costs in priority to the debtor's solicitor: *Ex parte Page* (1). It does not signify that *Royle* was also trustee, for *Kidson* was appointed sole acting trustee.

Mr. *Roxburgh*, Q.C., and Mr. *Doria*, for *Kidson*:—

The Appellant delayed so long in applying for payment, that *Kidson* may well have thought that he had paid himself out of the assets which he had received.

SIR JAMES BACON, C.J.:—

It was the duty of *Kidson* as trustee first to retain the costs of realizing the assets, and then to pay the costs of the receiver. Instead of doing this, he, without communicating with the receiver, handed over nearly the whole of the assets to the debtor's solicitor. The solicitor had no right to be paid in priority to the receiver, and *Kidson* was not justified in so paying him. He must, therefore, pay the receiver's taxed costs out of his own pocket, and also the costs of the application to the County Court. But I give no costs of the appeal.

Solicitors for the Appellant: Messrs. *Bower & Cotton*, agents for Messrs. *Gardner & Horner, Manchester.*

Solicitor for the Trustee: Mr. *Redhead*, agent for Messrs. *Cobbett, Wheeler, & Cobbett, Manchester.*

(1) 25 L. T. (N.S.) 716.

C. J. B.
1875
July 26.

## *Ex parte* RASHLEIGH. *In re* DALZELL.

*Petitioning Creditor's Debt—Non-Trader—Debt contracted after the passing, but before the coming into operation of the Bankruptcy Act*, 1861—*Covenant to repay a specific Sum, and further Advances—Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *s.* 118—*Bankruptcy Act*, 1861 (24 & 25 *Vict. c.* 134), *ss.* 90, 232—*Bankruptcy Repeal Act*, 1869 (32 & 33 *Vict. c.* 83), *s.* 20.

A non-trader cannot be adjudicated a bankrupt in respect of a debt contracted before the day on which the *Bankruptcy Act*, 1861, came into operation.

By a mortgage deed the mortgagor covenanted to pay the original mortgage debt and any further sums which might be advanced to him by the mortgagee. Further advances having been made by the mortgagee:—

*Held*, that, for the purpose of the presentation of a bankruptcy petition against the mortgagor, the obligation to repay the further advances constituted a debt contracted at the date of the mortgage deed.

Rep. on appl. 2 Ch. D. 9.

THIS was an appeal from a decision of the Judge of the *Oxford* County Court.

Prior to September, 1861, the Rev. *H. B. Rashleigh*, *John Dalzell*, *Robert Dalzell*, Sir *W. B. Call*, the Rev. *James King*, and three other persons, were partners in the working of the *Machen Colliery*. On the 10th of September, 1861, articles of agreement under seal were executed by the eight persons, containing a recital that *John Dalzell* and *Robert Dalzell* were indebted to the other six persons in the several sums therein mentioned, and it was agreed, and *John Dalzell* and *Robert Dalzell* jointly and separately covenanted with the other six persons, that the payment of the sums in question, amounting to £6341 18*s.* 6*d.*, and any other sums which might be advanced by the other six persons to the two *Dalzells*, together with interest, should be secured by a mortgage deed of even date. By the indenture of even date, *Robert Dalzell* and *John Dalzell* jointly and severally covenanted (in the form of an ordinary mortgage covenant) with Sir *W. B. Call* and *James King* (who were acting as trustees on behalf of the six) to pay the £6341 18*s.* 6*d.* and interest, and also to pay any further sums which might be advanced by *Call* and *King*, or the survivor of them, with interest. This indenture also contained a conveyance by way of mortgage by the *Dalzells*, of some real estate to *Call* and *King*, to secure the payment of the £6341 18*s.* 6*d.* and further

C. J. B.
1875
*Ex parte* RASHLEIGH.
*In re* DALZELL.

advances. Further advances were made by *Call* and *King* after the execution of these deeds. *King* died on the 21st of June, 1864. *Call* died on the 22nd of December, 1864. *H. B. Rashleigh* was his executor. On the 3rd of September, 1874, he recovered judgment-at-law against *Robert Dalzell* for £9256 11*s.* 11*d.*, the amount due from him for principal and interest on his covenant. This sum not having been paid, *Rashleigh* issued a debtor's summons against *Dalzell* for £9433 11*s.* 10*d.*, being the amount of the judgment debt with subsequent interest. The Judge dismissed the summons, on the ground that, *Dalzell* being a non-trader at the time the debt was contracted, no petition in bankruptcy could be presented against him. *Rashleigh* appealed.

Mr. *De Gex*, Q.C., and Mr. *Finlay Knight*, for the Appellant:—

A debtor's summons can only be issued in respect of a debt which would support a bankruptcy petition against the debtor: *Bankruptcy Act*, 1869, s. 7. But the judgment upon which this summons was issued was recovered long after non-traders became liable to the bankrupt law. And even if the debt is to be taken to have been contracted at the date of the execution of the deed of the 10th of September, 1861, that was after the passing of the *Bankruptcy Act*, 1861, which received the royal assent on the 6th of August, 1861, and therefore sect. 118 (1) of the *Bankruptcy Act*, 1869, does not exempt the Respondent from the liability to be adjudicated a bankrupt.

Mr. *Karslake*, Q.C., and Mr. *Herbert Smith*, for the debtor:—

The Court of Bankruptcy can go behind a judgment and look at the nature of the debt, and the consideration for it. Here the debt was contracted under the covenant contained in the deed of the 10th of September, 1861, and it does not make any difference that a judgment has been recovered since. The 10th of September, 1861, must be taken to be the date when the debt was contracted: *Williams* v. *Harding* (2); *Bartlett* v. *Hudson* (3). Then it is clear from sects. 90 and 232 (4) of the *Bankruptcy Act*, 1861, that when

(1) Sect. 118: "No person not being a trader shall be adjudged a bankrupt in respect of a debt contracted before the date of the passing of the *Bankruptcy Act*, 1861."

(2) Law Rep. 1 H. L. 9. 12 Jur. N.S. 407

(3) 14 Sol. J. 893.

(4) Sect. 90 provides: "The debt of the petitioning creditor of any debtor

C. J. B. 1875 *Ex parte* RASHLEIGH. *In re* DALZELL.

that Act was in operation, a non-trader could not have been adjudged a bankrupt in respect of a debt contracted before the 11th of October, 1861.

It could not have been the intention of the Legislature to make a non-trader, by virtue of sect. 118 of the Act of 1869, liable to be adjudged a bankrupt in respect of a debt which would not have rendered him so liable while the Act of 1861 was in operation. The "date of the passing of the Act of 1861" in sect. 118 of the Act of 1869 must be taken to mean the date of the Act of 1861 coming into operation, *i.e.*, the 11th of October, 1861.

Mr. *De Gex*, in reply:—

Sect. 118 is express. Sect. 232 of the Act of 1861 is now repealed. But when the account is examined it appears that the sum for which the judgment was recovered is mainly composed of advances made since the 11th of October, 1861. These further advances, at all events, constitute a debt contracted since then, and they are sufficient in amount to support the summons. A covenant to pay any debt which the covenantor may subsequently contract cannot make the date of the execution of the covenant the date of the contracting of the debt which is subsequently contracted.

[The CHIEF JUDGE:—*Williams* v. *Harding* (1) decides that it does.]

That was the case of an obligation to pay future calls which was contracted by the execution of the deed of settlement of a company. The shareholder, when called upon, is bound to pay, because of his original covenant. That is quite different from the present case. Unless the subsequent advances were made, there could be no obligation to repay them, and the mortgagee was in no way bound to make any further advances. This was nothing more than an ordinary mortgage covenant. In both the cases cited the

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not being a trader . . . must be a debt contracted after the passing of this Act, and the judgment debtor summons must be a summons in respect of a debt contracted or of a liability incurred after the passing of this Act."

Sect. 232 provides: "This Act shall commence and take effect from and after the passing thereof as to the appointment of the officers hereby authorized to be appointed, and as to all other matters and things from and after the 11th day of October, 1861."

(1) Law Rep. 1 H. L. 9.

debt had been contracted before the date of the passing of the Act of 1861, not, as here, between the date of its passing and its coming into operation.

SIR JAMES BACON, C.J.:—

In *Williams* v. *Harding* (1) a question was raised between the official manager of an insolvent company and one of the shareholders who had become bankrupt, whether the liability of the shareholder to pay calls, which arose upon his executing the company's deed of settlement before the passing of the *Bankruptcy Act*, 1861, constituted a debt contracted at the date of the execution of the deed of settlement, and it was held that it did. The question was discussed at great length. Lord *Cranworth*, in delivering his judgment, considered very fully the policy of the bankrupt law, and the effect of the positive enactments. The law is very clearly laid down by that case, and in my opinion it applies to the present case, the result of it being that the judgment debt must be taken to have been contracted on the 10th of September, 1861.

Then the question remains, what is the effect of sect. 118 of the present *Bankruptcy Act?* It is argued that as the Act of 1861 received the royal assent on the 6th of August, that is the date of its passing, and consequently that a debt contracted under a deed dated the 10th of September, 1861, was contracted after the passing of the Act. But sect. 118 is expressed in nearly the same terms as sect. 90 of the Act of 1861, and that section must be construed by the aid of sect. 232. Mr. *De Gex* argues that sect. 232 being now repealed, sect. 118, when it speaks of the date of the passing of the Act of 1861, must be taken literally. But sect. 20 of the *Bankruptcy Repeal Act* (32 & 33 Vict. c. 83) reserves all existing rights. The Act of 1861 is repealed for all future purposes; but it remains of full validity and effect with regard to any case to which it originally applied. In the present case I must therefore have regard to it in construing sect. 118 of the Act of 1869. In my opinion the order of the County Court is right, and I must dismiss the appeal.

Solicitors for the Appellant: Messrs. *Rashleigh & Smart.*

Solicitors for the Respondent: Messrs. *Rickards & Walker.*

(1) Law Rep. 1 H. L. 9.

C. J. B.

1875

*July* 26, 30.

## *Ex parte* STEVENS. *In re* STEVENS.

*Bill of Sale—Registration—Successive Renewals—Act of Bankruptcy—Assignment of all Debtor's Property to secure past Debt—Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *s.* 6—*Bills of Sale Act*, 1854 (17 & 18 *Vict. c.* 36), *s.* 1.

A bill of sale of the whole of the mortgagor's property, given by way of renewal of a former one not registered, is, if no fresh advance be made by the mortgagee, an act of bankruptcy, and void as against the trustee in bankruptcy of the mortgagor, notwithstanding its registration in due time.

*Ramsden* v. *Lupton* (1) explained.

*Ex parte Cohen* (2) followed.

THIS was an appeal from a decision of the Registrar of the *Exeter* County Court, acting as Judge.

On the 14th of June, 1875, a bankruptcy petition was presented against *John Stevens*, a grocer, at *Teignmouth*. The act of bankruptcy alleged was that the debtor had, within six months before the filing of the petition, made a fraudulent transfer of his property. He disputed the act of bankruptcy. From the evidence it appeared that in February, 1875, he borrowed £200 of his brother, *Samuel Stevens*. At that time he owed his brother £600 for previous advances, and he gave him a bill of sale to secure the repayment of the whole £800, and any further advances which the brother might make, with interest. The bill of sale was expressed to be made in consideration of the old debt of £600 and of £200 then advanced, and it contained an assignment to *Samuel Stevens* of all the household goods and furniture, and stock-in-trade, book debts, and all other the personal estate of *John Stevens*, subject to redemption on payment of the principal money and interest. *John Stevens* had no other property, except some leasehold cottages which were mortgaged for more than their value. This bill of sale was not registered.

From the evidence of *John Stevens* it appeared that the £600 mentioned in the bill of sale was made up of two sums of £150 and £400, which had been lent to him by his brother some time before, and interest thereon, and that at the time when these advances were made he had promised to give his brother security. The bill of sale was renewed several times, in each case before the expira-

(1) Law Rep. 9 Q. B. 17. (2) Law Rep. 7 Ch. 20.

C. J. B.
1875
*Ex parte* STEVENS.
*In re* STEVENS

tion of the three weeks allowed for registration. The last renewal was a bill of sale dated the 26th of May, 1875, which was (with the exception of the date) an exact copy of the first. This last bill of sale was registered, but not till after the presentation of the bankruptcy petition. No further advance of money was made to *John Stevens* after the execution of the first bill of sale.

Evidence was also given by a Mr. *Blanchford*, who had prepared all the bills of sale except the last, and had acted in other respects on behalf of *Samuel Stevens*, and he said "the reason why the bills of sale were not registered was to avoid publicity."

The Registrar held that the bill of sale of the 26th of May was an assignment of the whole of the debtor's property in consideration of a past debt, and that its execution amounted to an act of bankruptcy, and he adjudicated the debtor a bankrupt. The debtor appealed.

Mr. *Bagley*, for the Appellant:—

I contend that the last bill of sale was in no way fraudulent or an act of bankruptcy. The advances were originally made on the faith of a promise that security should be given. The last bill of sale was a substitute for the former one, which was cancelled. *Stansfeld* v. *Cubitt* (1) does not apply, for in that case there was an act of bankruptcy before the execution of the bill of sale. The Registrar based his decision mainly on *Ex parte Cohen* (2). But there the Court was of opinion that there had been a concerted fraud between the debtor and the creditor. It is true that in the judgments of the Lords Justices there are some expressions about evading the policy of the *Bills of Sale Act*. But the subsequent cases of *Smale* v. *Burr* (3) and *Ramsden* v. *Lupton* (4) shew that it is no objection to a transaction that the provisions of an Act of Parliament are evaded. The only question is whether the Act meets the case.

Mr. *Finlay Knight*, for the petitioning creditor:—

*Ramsden* v. *Lupton* and *Smale* v. *Burr* apply only to the case of an execution creditor. In deciding the former the Court of Exchequer Chamber expressly said that they did not interfere

(1) 2 De G. & J. 222.
(2) Law Rep. 7 Ch. 20?
(3) Law Rep. 8 C. P. 64.
(4) Ibid. 9 Q. B. 17.

C. J. B. 1875 *Ex parte* STEVENS. *In re* STEVENS.

with the authority of such cases as *Ex parte Cohen* (1), which they approved. I contend that *Ex parte Cohen* is precisely in point. There is no evidence of any contract that the first bill of sale should be renewed. The last bill was really an assignment of the whole property of the debtor without any new consideration, and was therefore an act of bankruptcy: *Ex parte Foxley* (2).

Mr. *Bagley*, in reply.

SIR JAMES BACON, C.J.:—

The question is, whether there has not been a fraud upon the bankrupt law. The whole of the money secured by this bill of sale had been advanced before it was given; it was given to secure an antecedent debt. The evidence shews that the reason why the first bill of sale was not registered was to avoid publicity. The transaction is plainly within the policy both of the *Bills of Sale Act* and of the bankrupt law. *Ramsden* v. *Lupton* (3) does not affect the principle applicable to the present case; it related only to the rights of an execution creditor; there was no bankruptcy. Chief Justice *Coleridge*, in the course of his judgment, referred to *Stansfeld* v. *Cubitt* (4) and *Ex parte Cohen*, and said: "From that kind of decision, upon such principles, no member of this Court is inclined to dissent."

Here the money was lent from time to time, upon the faith of an agreement that security should be given for it; but when the first bill of sale was given it was not registered, in order to avoid publicity. That is to say, as soon as the creditor should see that the debtor's affairs were coming to a crisis, he was to have any bill of sale he could get, and register it, without giving any fresh consideration for it. Under these circumstances, the debtor's intention clearly was to put the whole of his estate into the hands of the creditor to secure an antecedent debt. I think that the Registrar's decision was quite right, and I dismiss the appeal with costs.

Solicitor for the Appellant: Mr. *S. D. Hamilton*, agent for Mr. *J. W. Friend, Exeter.*

Solicitors for the Respondent: Messrs. *Makinson & Carpenter*, agents for Mr. *M. Fryer, Exeter.*

(1) Law Rep. 7 Ch. 20.
(2) Ibid. 3 Ch. 515.
(3) Law Rep. 9 Q. B. 17.
(4) 2 De G. & J. 222.

## COGAN *v.* DUFFIELD.

V.-C. B.
1875
July 21

[1874 C. 20.]

*Rectification—Settlement in pursuance of Articles—Limitation in default of Children—Ultimate Trust of Wife's Property to Wife—Arrears of Income due at Death of Husband—Reduction into Possession.*

A lady, possessed of about £12,000 consols, being engaged to be married, a draft settlement in the usual form was submitted to the intended husband, who objected to some of its provisions, and insisted that if there should be "no children," and he should survive his wife, the fund should belong to him. Articles embodying this provision were hastily signed before the marriage; and after the marriage, the fund having been transferred to the trustees, a draft settlement, in execution of the articles, was prepared, but objected to by the husband, and, as ultimately executed, contained limitations to the husband and wife and the survivor for their lives, and as to the capital to the children of the marriage absolutely, not to such as should attain twenty-one or marry, and without any limitation over, in the event of the death of a son or of an unmarried daughter under twenty-one. There was also a provision that "if there should be no child" of the husband and wife, and the husband should survive the wife, the fund should belong to him; but the deed contained no alternative limitation in the events of there being no child, and of the wife surviving the husband. The husband brought no property into settlement.

In the event, one child was born, but died an infant in the lifetime of both parents. The husband died; and his representative claiming the fund, subject to the widow's life interest—upon bill by the widow for rectification of the settlement, and for a declaration that she was entitled to the fund:—

*Held*, that the transfer of the fund to the trustees was not a reduction into possession by the husband:

*Held*, also, that the settlement was not in accordance with the articles, and that it ought to be rectified; and that, in the events which had happened, the Plaintiff was entitled to the fund:

*Held*, also, that the Plaintiff was entitled to arrears of income due at the death of the husband.

CAUSE.

Shortly before the 15th of March, 1867, the late *Joseph Cogan*, M.D., of *Wheatley, Oxfordshire*, and afterwards of *Brighton*, entered into an engagement of marriage with Miss *Agnes Duffield*, who was possessed of a fortune of £12,096 15*s.* 1*d.* consols, standing in her own name. Upon the engagement becoming known to her brother, *Thomas Duffield*, he consulted the family solicitor,

V.-C. B. 1875 COGAN v. DUFFIELD.

Mr. *Thomas Hedges Graham*, who prepared a draft settlement in the usual form, giving the income to the Plaintiff for her separate use without power of anticipation during the coverture, then to the survivor for life, and then as to both *corpus* and income (subject to a joint power, and, in default, a power to the survivor, to appoint amongst issue) in trust for all the children or any the child of the marriage who being sons or a son should attain twenty-one, or being daughters or a daughter should attain that age or marry; and in default of any such child, and in case *Agnes Duffield* should survive *Joseph Cogan*, then for her testamentary appointees or statutory next of kin.

Dr. *Cogan*, however, did not either refuse or agree to execute this draft.

On the 15th of March Mr. *Duffield* came down to *Brighton*, where his sister was staying, and with her concurrence called on Mr. *Robert Gramshaw*, a solicitor, and asked him to prepare an agreement for a settlement. Mr. *Gramshaw* accordingly called the same evening on Miss *Duffield*, and received her personal instructions; acting upon which, he prepared articles of agreement, whereby, after reciting that, whereas the draft of a marriage settlement had been already prepared, and had been "perused and assented to by" Dr. *Cogan* and Miss *Duffield* respectively, but that there was not then time to engross the same, it had been agreed that as soon as conveniently might be after the marriage, the stock should be transferred into the names of *Thomas Duffield* and *Bernard Cogan*, M.D. (also of *Wheatley*, a brother of Dr. *Joseph Cogan*), upon the trusts therein declared, it was witnessed that it was thereby agreed that as soon as conveniently might be after the marriage, Miss *Duffield* should transfer, and "particularly" that Dr. *Joseph Cogan* should join in transferring, the stock then standing in her name into the names of *Thomas Duffield* and *Bernard Cogan*, upon the trusts declared in "the aforesaid draft marriage settlement, or as near thereto as circumstances will admit, or otherwise for the benefit of the said *Agnes Duffield* and *Joseph Cogan*, and their child or children, if any . . . the trusts of the income thereof being for the benefit of the said *Agnes Duffield* and *Joseph Cogan* during their lives; and the trusts of the capital being for and amongst the children according

to the appointment of the said *Joseph Cogan* and *Agnes Duffield*, or the survivor of them, and in default of appointment to the children equally;" and that *Joseph Cogan* and *Agnes Duffield* agreed to do and execute all further acts and deeds "necessary for perfecting the said settlement, or carrying out the objects of this agreement."

Mr. *Gramshaw* took this draft agreement about ten o'clock the next morning to the *Bedford Hotel*, *Brighton*, where Mr. *Duffield* and the Doctors *Cogan* were present. He read the draft, and all parties were in agreement thus far—that Dr. *Joseph Cogan* "insisted on all reference to the proposed draft settlement in the agreement being struck out, and that, in case he should survive the Plaintiff, and there should be no child of the marriage, the fund should be at his absolute disposal." As to what further took place at the interview, there was a diversity of recollection.

As the time fixed for the marriage was eleven o'clock that morning, Mr. *Gramshaw* hurriedly, and on the spur of the moment, prepared another agreement, which was executed by all parties immediately before the ceremony.

By this deed, made between Dr. *Joseph Cogan* of the first part, Miss *Duffield* of the second part, and *Thomas Duffield* and Dr. *Bernard Cogan* of the third part, it was agreed that Dr. *Joseph Cogan* should join Miss *Duffield* in transferring the consols into the names of the two trustees, and that they should hold the same, with powers of varying the investment of the trust property, with the consent and at the discretion therein mentioned; and the agreement continued thus:—

"The trusts of the income thereof being for the benefit of the said *Agnes Duffield* and *Joseph Cogan* during their lives, and the trusts of the capital being for and amongst the children, according to the appointment of the said *Joseph Cogan* and *Agnes Duffield*, or the survivor of them; and in default of appointment to the children equally; and in the event of there being no children, and of the said *Joseph Cogan* being the survivor, the trust property to be at his absolute disposal."

The marriage having taken place on the 16th of March, 1867, the sum of consols was transferred into the names of *Thomas*

V.-C. B. 1875 COGAN v. DUFFIELD.

*Duffield* and *Bernard Cogan;* and in the course of the same year the draft of a settlement was prepared by Mr. *Graham,* in which the interests of the children were, in default of appointment, limited to those attaining twenty-one, or if daughters marrying under that age; but Dr. *Joseph Cogan,* without agreeing to or refusing to execute any such settlement, paid the costs of its preparation, and instructed his own solicitors to prepare a draft. This was done under the advice of Mr. *J. L. Tatham,* conveyancing counsel, and a similar clause to that last mentioned was inserted, with a limitation that in default of any "such" child, if the wife should survive the husband, the fund should be for her absolutely. Dr. *Cogan* objected to this, and caused the draft to be again laid before the same counsel, with the instruction that it was the wish of the parties that in default of issue the fund should belong to Dr. *Cogan,* whether he should be the survivor or not. Counsel altered the draft by vesting the interests of the children at birth, and in the margin made the following note:—

"The trust as now altered agrees with the articles. I do not think a trust for such of the children as attain twenty-one is authorized by the articles."

But he added a clause, giving over (1) the interest of a son who should die under twenty-one, or of a daughter who should die under twenty-one unmarried, or the whole, in the event of there being no son who should attain twenty-one, and no daughter who should attain twenty-one and marry, upon the following trusts—if Dr. *Cogan* should survive his wife, in trust for him; but if he should die in her lifetime, in trust for her. Dr. *Cogan* was still dissatisfied, and the draft was again sent back to the same counsel, but he made no alteration in it; whereupon one of Dr. *Cogan's* solicitors himself altered the draft, inserting in the margin this note: "Altered, as now, in ink, to follow the language of the agreement." As thus altered, the draft was engrossed and executed. By the deed, which was dated the 1st of November, 1867, and expressed to be made between the husband and wife of the one part, and the trustees of the other part, after reciting the agreement of the 16th of March, 1867, and that it was intended "that the trusts

(1) As in *Taggart* v. *Taggart,* 1 Sch. & Lef. 84, 89.

and powers which were mentioned or indicated" therein should be by the present indenture "established or declared," and that "in order to provide for the disposition of the same trust fund and the income thereof, in cases not provided for by the same articles," it was agreed that such further trusts and powers as were declared or contained in the present indenture should be thereinafter declared or contained, it was witnessed that the fund should be held upon trust to pay the income "to the said *Joseph Cogan* and *Agnes* his wife during their lives, and after the death of either of them, then to the survivor," during his or her life, and after the death of the survivor, as to the capital, in trust for the children and child of Dr. and Mrs. *Cogan*, as they should jointly appoint, and in default, "in trust for all the children (if more than one), or any the child if but one" of Dr. and Mrs. *Cogan*, "such children, if more than one, to take equally as tenants in common, or if there should be but one such child, then the whole for such one child." Then followed a hotchpot clause, and an advancement clause; and then it was agreed and declared that "if there shall be no child of" Dr. and Mrs. *Cogan*, the trustees should stand possessed of the fund and income upon trust, "if the said *Joseph Cogan* shall survive the said *Agnes Cogan*, for the said *Joseph Cogan*, his executors or administrators."

Thus the interests of children, in default of appointment, remained vested at birth; and the alternative limitation, in the event of Dr. *Cogan* dying in his wife's lifetime, having been struck out of the draft, the settlement contained no express limitation of the fund in this event.

There was issue of the marriage one child only, a son, who died when about six months old, in the lifetime of both parents.

On the 6th of October, 1870, Dr. *Joseph Cogan* made his will, whereby he gave all his real and personal estate to his brother, *Bernard Cogan*, the above-named trustee of the agreement and settlement, absolutely; and by a codicil, dated the same day, after giving his wife a legacy of twenty guineas, he continued: "As by her marriage settlement she is fully provided for, my wife will well understand my feeling in preferring to provide for my brother *Bernard*, the companion of my days, and fellow-worker, particularly as she is so well provided under settlement."

V.-C. B. 1875 COGAN v. DUFFIELD.

Having made a further codicil, Dr. *Joseph Cogan* died on the 13th of June, 1873, and his will and codicils were shortly afterwards proved by Dr. *Bernard Cogan* in the Probate Court in *Ireland*.

The bill was filed on the 26th of January, 1874, by *Agnes Cogan*, widow, against *Thomas Duffield* and *Bernard Cogan*, stating the above facts, alleging that at Dr. *Cogan's* death some rents of certain real estate (which had been purchased during the coverture under the trusts of the settlement, and were part of the trust estate) were in arrear at Dr. *Cogan's* death, and that the Defendant *Bernard Cogan* refused to account for them; and praying for a declaration that the settlement was not executed in accordance with the agreement, and that it might be rectified; for a declaration that the Plaintiff was entitled to all arrears of rent due at the death of Dr. *Cogan*, and which had accrued since, and that she was now absolutely entitled to all the trust property; and that the Defendants might be ordered to convey and transfer the same to the Plaintiff, or that the trusts of the agreement and of the settlement, when rectified, might be administered under the direction of the Court.

The Defendant Dr. *Bernard Cogan*, by his answer, claimed to be entitled to the fund, subject to Mrs. *Cogan's* life interest, as representative and legatee of his brother.

There was no dispute as to the facts as stated above.

Dr. *B. Cogan*, by his answer, said that his late brother had a large professional income, and was possessed of private means. From conversation with his late brother, he knew that both he and the Plaintiff were "opposed to" such a settlement as was prepared by Mr. *Graham*, and that "they desired to marry without any settlement at all," but that his brother ultimately "consented to a settlement being made, so as to secure to the Plaintiff a life interest in the property in the event of her surviving him, and to limit the property to the issue, if any, of his said marriage, but objected altogether to any further interference with his marital rights."

His statement as to what took place at the meeting on the morning of the 16th of March was as follows:—

Mr. *Gramshaw* "produced an agreement for a settlement ready

prepared, and endeavoured to get the said *Joseph Cogan* to sign the same. *Joseph Cogan* refused to sign such agreement, on the express ground that it would interfere with his marital right, and might cause the property to revert, in default of issue of the marriage, to the Plaintiff's family, to which he decidedly objected. In his presence, and by his desire, I proposed to Mr. *Gramshaw* that *Joseph Cogan* should write a letter engaging to invest the money in such a manner as to secure it after his decease to the Plaintiff for life, and to her children by him, because, as he said, he could understand that; but he stated that he did not feel that he understood the effect of the agreement which was proposed for his signature. Mr. *Gramshaw* then positively assured the said *Joseph Cogan* that the proposed agreement would not have the effect of causing the property to revert to the family of the Plaintiff; and on that assurance *Joseph Cogan* consented to sign the said proposed agreement."

On the other hand, Mr. *Gramshaw* and Mr. *Duffield*, on behalf of the Plaintiff, deposed that, except in the particulars first stated above, Dr. *Joseph Cogan* "assented to" the draft agreement brought to the hotel by *Gramshaw;* and, further, that "*Joseph Cogan* never raised any objection to the property becoming the absolute property of the Plaintiff, in case she should survive him, and there should be no children who should attain twenty-one or marry." They also contradicted the Defendant's statement as to his proposal that Dr. *Joseph Cogan* should write a letter, and as to Dr. *Joseph Cogan's* remark upon that proposal.

Dr. *Joseph Cogan* brought no property into the settlement.

Mr. *Davey*, Q.C., and Mr. *Jason Smith*, for the Plaintiff:—

We say, first, upon the construction of these articles, as they stand, there is a trust, in the events that have happened, for the Plaintiff. Secondly, in carrying into effect executory articles, the Court always limits the interests of children to such children as shall attain twenty-one, or if females, marry under twenty-one; and, thirdly, there is, independently of the articles, in the events that have happened, a resulting trust for the Plaintiff.

In construing the articles, the Court is at liberty to look at the surrounding circumstances. To what did the late Dr. *Cogan* at

V.-C. B. 1875 COGAN v. DUFFIELD.

the interview of the 16th of March object? He objected to the reference contained in *Gramshaw's* draft to the former draft settlement by *Graham;* and he insisted upon a limitation of the property to himself if he should survive his wife, and there should be no children. To all the rest he assented; that, we say, is the result of the evidence; and the consequence is, that *Gramshaw's* draft is imported into the evidence. The Court is enabled to look at it.

When looked at, it is found to contain a declaration of trusts by reference to those in the draft marriage settlement prepared by *Graham,* and an agreement by Dr. *Joseph Cogan* and Miss *Duffield,* to do all acts necessary for perfecting that settlement. To this reference Dr. *Cogan* objected; and why? Because he wished to secure the estate in the events above mentioned to himself: but in these events only. The draft settlement prepared by *Graham* contained a limitation to the Plaintiff in the events of her surviving her intended husband, and there being no children, and to that Dr. *Cogan* assented. It was only in one event, which has not happened, that any departure from Mr. *Graham's* draft was intended. By the light of these two former documents, the true construction of the articles is ascertained.

Taking this agreement as executory articles which have to be carried into effect by the Court, how would the settlement be framed? The gift to children would be to such children only as attained twenty-one or married; so that upon the death of a son or of an unmarried daughter under age, the property would not belong to the surviving father as representative: *Taggart* v. *Taggart* (1); *Spirett* v. *Willows* (2); *Young* v. *Macintosh* (3); *Blackburn* v. *Stables* (4).

The frame of the settlement consequently is wrong in this respect. It may be said that *Taggart* v. *Taggart* does not carry us far enough, but it gives effect to the last clause of the settlement, by shewing that "if there shall be no child" will be held by the Court to mean "no child who shall attain twenty-one or marry;" thus preventing Dr. *Cogan* from taking as representative of his son, and supplementing the express provision in the event

(1) 1 Sch. & Lef. 84, 89.
(2) Law Rep. 4 Ch. 407.
(3) 13 Sim. 445.
(4) 2 V. & B. 367, 370.

(which did not happen) of Dr. *Cogan* surviving, by suggesting the inference that, if Mrs. *Cogan* should survive, the property should revert to her. That is how the draft was drawn by the conveyancer.

Being entitled to the income, the Plaintiff is clearly entitled to the arrears of rent.

As to the resulting trust: Mrs. *Cogan* is the survivor; this was her money; the husband never reduced it into possession: *Pringle* v. *Pringle* (1); it never stood in his name; and if, as may be contended on the other side, the settlement contains no implied limitation, but is silent as to what is to become of the fund in the event of the wife surviving, then it must be as if the settlement were out of the way, and there is a resulting trust for the wife.

Supposing there had been six children, and five of them had died under age, can it be conceived to be the true construction of the agreement that the father might take five-sixths of the fund, and leave the surviving child only one-sixth?

Mr. *G. W. Lawrance*, for the Defendant *Thomas Duffield*.

Mr. *Kay*, Q.C., and Mr. *Freeling*, for the Defendant *Bernard Cogan*:—

The case must be decided on the construction of the agreement, which is silent on the subject of what is to happen if Mrs. *Cogan* should survive. But why silent? If the surrounding circumstances are gone into, it will be found that, after considerable discussion, and resort to the best advice, the omission was intentionally made. The question of how far the husband would consent to give up his marital right was finally settled.

Then, what right has the Plaintiff to have this settlement rectified? She must shew that it was drawn in its existing form by a mistake which was common to all parties: *Rooke* v. *Lord Kensington* (2). If it was drawn pursuant to the intention of one of the parties, but as to the other under a mistake, it cannot be rectified: *Sells* v. *Sells* (3); *Earl of Bradford* v. *Earl of Romney* (4); *Harris* v. *Pepperell* (5); *Thompson* v. *Whitmore* (6); and the inten-

(1) 22 Beav. 631.
(2) 2 K. & J. 753.
(3) 1 Dr. & Sm. 42.
(4) 30 Beav. 431, 438, 439.
(5) Law Rep. 5 Eq. 1, 4.
(6) 1 J. & H. 268.

V.-C. B. 1875 COGAN v. DUFFIELD.

tion of the parties means their intention at the time, not that which would have been their intention had they foreseen the result: *Wilkinson* v. *Nelson* (1); *Barrow* v. *Barrow* (2).

The question is, how far did Dr. *Cogan* agree to give up his marital right. On the morning of the marriage, they knowing that he had not executed Mr. *Graham's* draft, present to him another, in which reference is made to that draft. To this he objects, and then the present articles are drawn, which are agreed to and executed. By them the marital right, in the events which have happened, is not interfered with. The Court never interferes with the marital right beyond what is necessary: *Walsh* v. *Wason* (3); referring to *In re Suggitt's Trusts* (4).

Further, by permitting the transfer of the fund from his wife's name into the names of the trustees, Dr. *Cogan* did, in equity, reduce this fund into possession: *Burnham* v. *Bennett* (5); *Cuningham* v. *Antrobus* (6); *Hamilton* v. *Mills* (7).

The narrative shews that either in one way or the other the conveyancer was clearly wrong. Either he should not have inserted the limitation over in the event of death of a child under twenty-one or marriage, or he should not have inserted the limitation to Mrs. *Cogan* if she should survive. Both these clauses were pure invention on his part; the proper limitation would have been to the children, so as to vest at birth. Not only are they not according to the written agreement, but they are contrary to Dr. *Cogan's* express declaration, who said that this was the last thing he would consent to.

*Taggart* v. *Taggart* (8) shews only this—that there ought to be a provision for limiting the fund over in case any of the children shall die under twenty-one and without issue; it does not prescribe any form of ultimate limitation.

Mr. *Davey*, in reply.

SIR JAMES BACON, V.C.:—

The whole question seems to turn upon the construction of

(1). 9 W. R. 393.
(2) 18 Beav. 529.
(3) Law Rep. 8 Ch. 482.
(4) Ibid. 3 Ch. 215.
(5) 2 Coll. 254.
(6) 16 Sim. 436.
(7) 29 Beav. 193.
(8) 1 Sch. & Lef. 84, 89.

this agreement, which preceded the marriage, and which was not come to hastily. It was executed hastily, no doubt, but it was not come to until after the subject had occupied the attention of both parties to the marriage.

The lady had a fortune of some £12,000 consols. The gentleman did not settle anything, whatever his other property might be. The object and purpose of the agreement being signed was, that the disposition of the £12,000 consols should be settled by contract between the parties.

The surrounding circumstances must, no doubt, in all propriety and fairness, be regarded. The surrounding circumstances are stated by Dr. *Bernard Cogan*. In his answer he says, that upon the agreement being presented by Mr. *Gramshaw* on the day on which the marriage was afterwards celebrated, *Joseph Cogan* refused to sign the agreement on the express ground that it would interfere with his marital right, and might cause the property to revert, in default of issue of the marriage, to the Plaintiff's family—to which he decidedly objected. Then he says he proposed that *Joseph Cogan* should write a letter, so as to secure the property, after his decease, to the Plaintiff for life, and to her children by him, because he said he could understand that, but he did not feel he understood the effect of the agreement. Then the answer states: "Mr. *Gramshaw* positively assured *Joseph Cogan* that the proposed agreement would not have the effect of causing the property to revert to the family of the Plaintiff, and on that assurance *Joseph Cogan* consented to sign the proposed agreement."

On the other hand we have the depositions of Mr. *Gramshaw* and Mr. *Duffield*, who were both present at that meeting. Mr. *Gramshaw* says: "I read the draft agreement to *Joseph Cogan*" (that is, as it was originally drawn), "but he insisted on all reference to the proposed draft settlement in the aforesaid agreement being struck out." That was acceded to. "And he also insisted that in case he should survive the Plaintiff, and there should be no child of the marriage, then that the trust property should be at his absolute disposal." He says further that *Joseph Cogan* "never raised any objection to the property becoming the absolute property of the Plaintiff, in case she should survive *Joseph Cogan*, and there should be no children who should attain

V.-C. B. 1875 COGAN v. DUFFIELD.

twenty-one or marry." Mr. *Thomas Duffield's* deposition is exactly in the same terms in those two particulars.

Now I have to consider the surrounding circumstances, and they are these:—A settlement had been prepared in draft, the stipulations of which it is not necessary to go into very fully. Interests were given to the husband and the wife for their respective lives, and for the life of the survivor, with a power of appointment for the intended wife, subject to the life interest of the husband. That draft settlement *Joseph Cogan* positively refused to have anything to say to. He would not execute that settlement because, as I gather from Dr. *Bernard Cogan's* deposition, he saw that, in that event, if the limitation went to the next of kin, it would revert to the wife's family, and that was the ground of his objection. But when the agreement is proposed to him—that being his objection to the agreement, and the objection, therefore, to the settlement—he insists upon all reference to the settlement being struck out, and he signs an agreement by which he stipulates and agrees that the trusts of the income shall be "for the benefit of the said *Agnes Duffield* and *Joseph Cogan* during their lives, and the trusts of the capital for and amongst the children, according to the appointment of *Joseph Cogan* and *Agnes Duffield*, or the survivor of them; and in default of appointment to the children equally; and in the event of there being no children, and of the said *Joseph Cogan* being the survivor, the trust property to be at his absolute disposal."

In my opinion the words of that contract are perfectly clear and distinct, as far as they go. The marital right, which is spoken of, and which then had not begun its existence, must have been in the contemplation, at least of Dr. *Joseph Cogan*, if not of the other parties; but a marital right *in esse* is disposed of by the agreement. The lady has got £12,000 consols; she is to transfer it, and he is to join with her in transferring it. It is said that that is a reduction into possession. I must say that no one of the cases which have been cited seems to me to justify that contention. In the case of *Cuningham* v. *Antrobus* (1), before Sir *Lancelot Shadwell*, which seems to have given him some trouble, he concluded that, where a transfer had been made by the trustees

(1) 16 Sim. 436.

of the fund to persons who were known to be trustees of the marriage settlement, it being allowed there to remain, and nothing more being done, that must be held to have been an exercise by the husband of his right to reduce the fund into possession for the purpose of the settlement.

The other case, *Burnham* v. *Bennett* (1), before Vice-Chancellor *Knight Bruce*, was plainly relieved from the difficulties which weighed upon Sir *Lancelot Shadwell*. There the husband after marriage dealt with the fund which was the property of his wife, took a new security for part of it, caused another part of it to be transferred, and the Vice-Chancellor was of opinion that there had been a reduction into possession.

What reduction into possession is there here, beyond the fact that the husband joined in the transfer, if he did join in it (as to which there is no evidence at all), for the purpose, not of reducing it into possession, but of making it subject to the terms of the settlement that was to be executed in pursuance of the agreement, and as to which, in the meantime, he was bound by the provisions of the agreement? But the agreement is defective, as Mr. *Tatham*, upon settling the draft settlement, afterwards points out. He supplies that defect. Why? Because, as a lawyer, he knew, if he had not had the case of *Taggart* v. *Taggart* (2) before him, that the principle of the law is, that where there is an executory contract, and it becomes necessary afterwards to execute that contract in the formal way, it must be executed according to the decisions of the Court, and that the executory agreement is only a note or memorandum of something which is to be reduced into more formal expression. He therefore inserted those provisions which he thought were necessary. Being convinced that the lady had not by the agreement parted with more of her interest in the fund than was actually expressed in the agreement, namely, that if these two events should occur—if there should be no child, and if Dr. *Cogan* should survive her—he was to have the disposal—Mr. *Tatham* did what seems to me to be perfectly right and proper, and what would have been done in the Judge's Chambers if there had been a reference to settle the draft settlement. He introduced the provisions which were afterwards struck out, but struck out under

(1) 2 Coll. 254. (2) 1 Sch. & Lef. 84.

V.-C. B. 1875 COGAN v. DUFFIELD.

circumstances which are not very clearly explained. I do not think there was anything wrong in it, but it seems that—Mr. *Tatham* still persisting in the necessity of his draft being allowed to remain in the shape in which it was before—Mr. *Anstie*, or somebody else, makes a pencil alteration in it, writes in the margin, "Altered as now, in ink, to follow the language of the agreement," that part of the settlement is reduced to the very words of the agreement, without addition or alteration, and the question as to what is the meaning of the agreement in that respect, is left to be decided at some future day.

I do not entertain any doubt about what the meaning of the agreement is. I cannot put upon it so preposterous and unreasonable a construction as to suppose that, if of this marriage there had been born ten or any other number of children, and all of them but one had died under twenty-one, the father, as their administrator, was to take nine-tenths of this fund for himself, and leave the only surviving child of the marriage with no other provision than one-tenth of the fund, which, according to all reason and sense, it was intended should be a provision for the children after the death of the husband and wife, subject, of course, to their powers of appointment.

In a recent case of *Smith* v. *Iliffe* (1) (which I do not say was exactly like this), I had to consider how the Court would deal not only with an executory instrument, but with a case that was much stronger than the present. The lady had married during her minority, the Court had approved of the settlement upon her marriage, and she came to complain that the Court had done that improvidently—that the Court had not provided for her interests as they ought to have been provided for, she being a minor; and, in the events which had happened, I was very easily convinced that it was the right of the lady to have the settlement reformed, and put in such a shape as the Court would have approved of, if the thing were new and nothing had been done. That did not differ from the principle of *Taggart* v. *Taggart* (2) in the slightest degree. It was only stronger, because the settlement had been executed under the sanction of the Court.

To come back to this case, in my opinion this agreement, the

(1) *Ante*, p. 666. (2) 1 Sch. & Lef. 84.

construction of which is the only question before me, presents no reasonable difficulty. It was executed, as I have said, in haste on the morning of the marriage. It provides properly for the husband and wife for their lives; it provides for the children, although imperfectly; and if there now were children of the marriage I should not hesitate one moment in saying that in reforming, or rather in completing, this settlement, it would be necessary to introduce those limitations which Mr. *Tatham* proposed to put into the draft, and which were afterwards struck out because they were not contained in the agreement. There was but one child of the marriage born, and that child lived only a short time. The husband and wife lived together. Then the husband died in 1873, and up to that time the settled property was enjoyed as the settlement proposed it should be enjoyed, and as the articles intended it should be enjoyed, during their joint lives. The rents or income were received by the husband. There was no reason why they should not be, under those circumstances. Upon the death of the husband, there being two persons entitled under the agreement as joint tenants, when one died and the other of necessity became entitled to the whole income, there can be no question, or no serious question, as to the arrears which were due at the death of the husband. No doubt they belong to the wife. Then, unless I am to hold that the effect of the agreement for a settlement is directly contrary to all ordinary practice, and to all reasonable intendment by the parties, I must say that, although it does not carry the intention of the parties into full effect, it contains the means which enable this Court to declare that the settlement is imperfect in this respect, that it does not give to the wife that which she is entitled to whether as a resulting trust or otherwise, namely, that part of her property which is not the subject of the settlement. The settlement has performed its full office; all its objects and purposes have been completed and satisfied, and all that remains is the property of the wife, because it was neither contracted for nor included in the settlement which was executed.

In my opinion, therefore, the Plaintiff is entitled to the relief which she asks, upon both grounds.

There will be a declaration that the settlement was not in accordance with the agreement made previously to the marriage,

V.-C. B. 1875 COGAN v. DUFFIELD.

and that it ought to be rectified, and reformed so as to carry that into effect; and then declare that in the events which have happened the Plaintiff is entitled, according to the second paragraph of the prayer of the bill, to all arrears of rent due at the time of the death of *Joseph Cogan*, and is now absolutely entitled to the trust property.

There will be a direction to convey the real estate, and to transfer the consols.

The costs of the suit, having been arranged, were ordered by consent to be paid out of the trust fund.

Solicitors for the Plaintiff and Defendant *Duffield:* Messrs. *R. S. Taylor & Son.*

Solicitors for the Defendant *B. Cogan:* Messrs. *Vizard, Crowder, & Anstie.*

END OF VOL. XX.

# INDEX.


**ABANDONMENT OF RAILWAY**—*Abandonment of Railways Act*, 1850 (13 & 14 *Vict. c.* 83)—*Railway Companies Act*, 1867 (30 & 31 *Vict. c.* 127), *ss.* 31–35—*Abandonment of Railways Act*, 1869 (32 & 33 *Vict. c.* 114)—*Return of Deposit—Assets of the Company—Costs of obtaining the Act—Statute of Limitations.*] A Board of Trade warrant of abandonment of a railway, under the *Abandonment of Railways Act*, 1850, and the *Railway Companies Act*, 1867, was made with a condition that moneys deposited in the Court of Chancery as security should be applied as part of the assets of the company:—*Held*, that the solicitor and parliamentary agent, not being promoters of the company, were entitled to be paid thereout their costs and charges for obtaining the Act.—The special Act gave a right to sue the company for the costs of obtaining the Act, and it incorporated the *Companies Clauses Act.*—By the *Companies Clauses Act*, s. 65, the money raised by the company is to be applied first in payment of such costs:—*Held*, that the *Statute of Limitations* did not run against creditors in respect of such costs until the company had assets to meet the claims:—*Held*, that the remedy given by the special Act was in addition to, and not in substitution for the right given by the *Companies Clauses Act* to payment out of the first assets of the company. *In re* KENSINGTON STATION ACT [197

**ABSENCE FOR SEVEN YEARS** - - 136
*See* PRESUMPTION OF DEATH.

**ACCUMULATIONS**—*Will—Construction—Lawful Period of Accumulation—Thellusson Act* (39 & 40 *Geo.* 3, *c.* 98)—*Felony—Mixed Fund—Intestacy.*] Testator devised a landed estate, and bequeathed all his personalty to a trustee, upon trust so to vest his real estate in, and cause his personal estate to be placed under the control of, the Court of Chancery, as that the Court might administer the same; and then bequeathed several annuities to be paid out of the rents and profits of the realty and the proceeds of the personalty, and directed that, subject to the payment of the annuities, the rents, income, and produce of the trust estate should be accumulated at compound interest until the decease of the last surviving annuitant, "or during such portion of such surviving annuitant's life as the rules of law will permit," and on the decease of the last surviving annuitant the whole of the trust estate funds and accumulations to be applied by the Court in the purchase of freehold land, to be conveyed to testator's nephew, *G. G.*,

**ACCUMULATIONS**—*continued.*
and his heirs:—*Held*, that, of the rents of the realty, and the income of the personalty, which would accrue during the interval (if any) which should elapse after the expiration of twenty-one years from the death of the testator, and the death of the surviving annuitant, there was an intestacy:—*Held*, further, that *G. G.* was not entitled, during the life of the surviving annuitant, to ask for payment of the fund to himself, subject to provision being made for the annuities.—The Court refused to make any order at present, except to pay the annuities and continue the accumulations. TALBOT *v.* JEVERS - - 255

**ACT OF BANKRUPTCY**—Assignment of all debtor's property - - - 786
*See* ASSIGNMENT OF ALL DEBTOR'S PROPERTY.

**ADEMPTION**—Bequest of stock—Subsequent mortgage - - - - 304
*See* LEGACY, SPECIFIC OR GENERAL.

**ADJUDICATION OF BANKRUPTCY**—After liquidation—Method of procedure - 777
*See* ADJUDICATION WITHOUT PETITION.

—— Joint and several—Consolidation - 758
*See* JOINT AND SEVERAL ADJUDICATION.

—— Petitioning creditor's debt - 762, 782
*See* PETITION FOR ADJUDICATION. 1, 2.

**ADJUDICATION WITHOUT PETITION**—*Liquidation—Subsequent Adjudication of Bankruptcy by the Court—Method of Procedure—Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *s.* 125, *sub-s.* 12.] Under sect. 125, sub-sect. 12, of the *Bankruptcy Act*, 1869, the Court has power to adjudge a liquidating debtor a bankrupt *mero motû*, acting on the knowledge it has acquired in the course of the liquidation proceedings. It is not necessary that a bankruptcy petition should be presented. *Ex parte* MARLAND. *In re* ASHTON - 777

**ADJUSTMENT OF SHAREHOLDERS' RIGHTS**—*Limited Company—Memorandum of Association—Liability to pay Debts—Contract by Articles of Association—Rights of Shareholders inter se—Fully paid-up Shares.*] By the memorandum of association of a company formed under the *Joint Stock Companies Act*, 1856, the liability was limited to £10 per share. By the articles of association it was provided, as regarded certain debts for which certain shareholders had given promissory notes, that if the company should be

**ADJUSTMENT OF SHAREHOLDERS' RIGHTS**—*continued.*
called upon to pay them, and should not have funds in hand applicable to the payment, each shareholder should contribute and pay to the company, as a debt due to the company, a proportionate amount according to the number of shares held by him:—*Held*, that though the memorandum of association limited the extent of liability as regarded creditors outside the company, there was nothing in the Act of 1856 preventing the shareholders *inter se* from contracting to make themselves liable to a greater amount; that the provision in the articles of association constituted such a contract; and consequently that holders of fully paid-up shares might be put on the list of contributories for the purpose of having a call made to meet the liability so incurred. *In re* Maria Anna and Steinbank Coal and Coke Company. Maxwell's Case - 585

**ADMINISTRATOR**—Debt to—Set-off - 155
*See* Advancement. 1.

—— Set-off—Debt barred by statute—Next of kin
*See* Set-off in Equity. 3. [644

**ADMIRALTY COURT**—Restraining proceedings in - - - - - - 325
*See* Injunction in Winding-up.

**ADVANCEMENT**—*Intestacy—Advancements by Portion—Statute of Distributions* (22 & 23 *Car.* 2, *c.* 10), *s.* 5—*Share of Intestate's Estate—Debt due to Administrator—Set-off.*] An "advancement by portion" within the meaning of sect. 5 of the *Statute of Distributions* is a sum given by a parent to establish a child in life or to make a provision for the child.—Sums given for the following purposes: (1) payment of the admission fee to one of the Inns of Court in the case of a child intended for the Bar; (2) the price of a commission and outfit of a child entering the army; (3) the price of plant and machinery and other payments for the purpose of starting a child in business:—*Held*, "advancements by portion."—Sums given for the following purposes: (1) payment of a fee to a special pleader in the case of a child intended for the Bar; (2) price of outfit and passage money of an officer in the army and his wife on going out to *India* with his regiment; (3) payment of debts incurred by an officer in the army; (4) assisting a clergyman in paying his housekeeping and other expenses:—*Held*, not "advancements by portion."—A debt due to the administrator of an intestate in his own right from one of the next of kin may be set off in a suit by the next of kin for administration of the estate against a sum due from the administrator in respect of the next of kin's share of the intestate's estate. Taylor *v.* Taylor - - - 155

2. —— *Husband and Wife—Banking Account in Joint Names—Resulting Trust.*] The husband of the Plaintiff being in failing health transferred his banking account from his own name into the joint names of himself and his wife, and directed the bankers to honour cheques drawn either by himself or his wife; and he afterwards paid in considerable sums to this account. All cheques were afterwards drawn by the Plaintiff at the direction of her husband, and the proceeds were applied in payment of household and other expenses. The husband never explained to the Plaintiff what his

**ADVANCEMENT**—*continued.*
intention was in transferring the account, but he was stated by the bank manager to have remarked at the time of the transfer that the balance of the account would belong to the survivor of himself and his wife. After the death of her husband (which took place a few months after the transfer) the Plaintiff claimed to be entitled to the balance:—*Held*, that the transfer of the account was not intended to be a provision for the Plaintiff, but merely a mode of conveniently managing her husband's affairs; and consequently that she was not entitled. Marshal *v.* Crutwell - 328

**ADVERSE POSSESSION**—Statute of Limitations
*See* Limitations, Statute of. 1. [692

**ADVOWSON** — *Will—Direction to sell—Vacant Benefice — Right to nominate.*] Testator, the owner of an advowson, after directing that £13,000 should be invested and the interest paid to his wife for her life for the support of herself and their children, directed his executors when the church was full to sell the advowson, and also certain freehold land, and invest the proceeds for the same purpose as before directed with respect to the sum of £13,000, and after the death of his wife then for the purposes in the will mentioned.—The testator died in September, 1874, the church then being full, and he left his widow and five infant daughters, his co-heiresses-at-law, him surviving. The executors did not sell the advowson, and on the death of the incumbent in February, 1875, the question arose who was entitled to nominate to the vacant benefice:—*Held*, that the right to nominate was in the widow. Briggs *v.* Sharp - - - - 317

**AFFIDAVIT OF NO SETTLEMENT** - 454
*See* Wife's Chose in Action. 2.

**AFTER-ACQUIRED PROPERTY** — Covenant to settle - - - - - 534
*See* Covenant to settle.

**AGENT**—Director—Shares paid up out of company's money - - - 580
*See* Fiduciary Relation.

—— Promoters of company—Agreement to indemnify against costs - - 620
*See* Agreement to indemnify.

—— Partnership—Agreement to share profits 331
*See* Perception of Partnership Profits.

**AGREEMENT**—Collateral—Easement - 444
*See* Collateral Agreement.

—— Payment of share of deceased partner 566
*See* Joint and Several Liability. 1.

—— Promoters of company—Indemnity against costs - - - - - 620
*See* Agreement to indemnify.

—— Sale of real estate—Statute of Frauds 11
*See* Frauds, Statute of.

—— To share profits of partnership - 331
*See* Perception of Partnership Profits.

**AGREEMENT FOR LEASE**—*Specific Performance—Delay—Lessor and Lessee.*] At the expiration in July, 1857, of a lease under which by assignment he was in possession of property, *B.* signed an agreement to accept from *A.* a new lease for thirty-one years, at the same rent as was reserved by the old lease, and payment of £600 on the day

**AGREEMENT FOR LEASE**—*continued.*
fixed for completion (1st August, 1857), with interest if the lease should not be completed on the day fixed. A draft lease was sent to *B.* for his approval but was not returned, and no steps were taken by *A.* to press for completion. *B.* remained in possession and paid rent, but no payment of the £600 or interest was ever made or demanded. In 1871 *A.* died. On bill by her legal personal representative:—*Held*, that as *B.'s* possession and payment of rent must be referred to the new agreement, and not to a holding over after the expiration of the former lease, the lapse of time did not operate as a bar to specific performance, which was accordingly decreed, with interest on the £600 from the 1st of August, 1857. Shepheard *v.* Walker - - - 659

**AGREEMENT TO INDEMNIFY**—*Companies Act*, 1862, *s.* 109—*Winding-up—Authority of Agent.*] Under the jurisdiction to adjust the rights of the contributories amongst themselves given by the *Companies Act*, 1862, s. 109, the Court will not under the winding-up enforce an alleged contract by the promoters to indemnify persons signing the subscription contract against all liability in respect of the shares, by directing a call payable primarily by the promoters only.—The authority of the clerk of a solicitor engaged in getting up a railway company to bind the company by a representation to persons signing the subscription contract that they would not be called upon to pay anything unless the line was made and opened, discussed. *In re* Brampton and Longtown Railway Company. Addison's Case - 620

**ALIENATION**—Restraint on - - 186
*See* Restraint on Alienation.

**ALTERATION**—Interest in devised property 428
*See* Revocation of Gift.

**ANCIENT LIGHTS** - - - 494, 500
*See* Light and Air. 1, 2.

—— Railway Clearing House Act—Compensation - - - - - 353
*See* Compensation under Railway Clearing House Act.

**ANGLE OF 45°** - - - - 494
*See* Light and Air. 1.

**ANNUITY CHARGED ON CORPUS**—*Will—Corpus or Income.*] Testator gave the residue of his estate to trustees to pay the income for the benefit of his wife and unmarried daughters and youngest son, and directed that upon the youngest son attaining the age of twenty-one years the trustees should invest a sufficient sum to secure the receipt of the annual sum of £50, to be paid by instalments as the dividends were received, to his wife for her maintenance, and subject thereto the trustees were to divide the whole of the trust estate amongst his eight children; and on the death of his wife the amount invested to secure her the annual income of £50 was to be divided in like manner amongst his eight children. The youngest son attained twenty-one in 1872. The income arising from the whole of the estate did not amount to £50 a year:—*Held*, that the widow was not entitled to be paid any arrears out of the *corpus*. Mitchell *v.* Wilton - 269

**APPEAL**—Bankruptcy - - - 143
*See* Bankruptcy Appeal.

**APPEAL IN WINDING-UP**—*Practice—Inrolment—Delay and Acquiescence.*] In November, 1871, *A.* was settled by the Court upon the list of contributories of a company in course of liquidation. Notice of appeal from the order was given on behalf of *A.* within twenty-one days, but afterwards withdrawn, and no further steps were taken during *A.'s* lifetime to dispute his liability. From June, 1871, until his death, in December, 1874, *A.* was out of the jurisdiction, but notice of all proceedings under the winding-up was received by his solicitors, and a call was paid on his behalf. —An application, after *A.'s* death (December, 1874), by his mother (who had acted on his behalf in the affairs of the winding-up, but was not his legal personal representative), for leave to inrol the order of November, 1871, with the view of an appeal to the House of Lords, was refused, on the ground that *A.'s* absence from *England* did not countervail the long delay during which the winding-up had proceeded on the footing that all intention by *A.* to contest his liability had been abandoned. *In re* United Ports and General Insurance Company. Browne's Case [639

**APPOINTMENT OF LIQUIDATOR** - - 360
*See* Liquidator.

**APPOINTMENT UNDER SPECIAL POWERS**—*General Words—Reddendo singula singulis.*] A testator gave his estate by will to trustees in the following words:—"I give, devise, and bequeath all my property over which I have any disposing power." The trusts of the will were for his wife for life for her separate use, and after her death for all his children who should attain twenty-one in equal shares, and upon failure of children, for the brothers and sisters of his wife:—*Held*, that the will must be read *reddendo singula singulis*, and operated as an appointment under two special powers, one of which was a power to appoint among his children subject to a life interest in his wife during widowhood; and the other was a power to appoint a life interest to his wife in a fund which, subject to such power, was held on trust for his children at twenty-one in equal shares. Thornton *v.* Thornton - - 599

**APPORTIONMENT**—*Will—Trust Legacy—Tenant for Life and Remainderman—Capital and Income.*] A testator bequeathed a legacy of £10,000 with interest from his death at 4 per cent. per annum to trustees upon trust to pay the income to certain persons during the life of one of them, and after her death upon trust for other persons.—The testator's estate was insufficient for payment in full of his legacies, and the realization of his assets occupied several years:—*Held*, that moneys from time to time received by the trustees and applicable to the legacy were divisible rateably between capital and income, so as to attribute to income £4 per cent. from the testator's death on the amount attributed to capital. *In re* Tinkler's Estate - - - - - 456

—— Costs—Petition under Lands Clauses Act 369
*See* Costs under Lands Clauses Act. 2.

**ARBITRATION**—Death of arbitrator - 100
*See* Substituted Contract.

—— Submission to - - - - 39
*See* Submission to Arbitration.

**ARREST OF SHIP**—Injunction—Winding-up 325
*See* Injunction in Winding-up.

**ARTICLES OF ASSOCIATION** — Contract in — Special liability - - - 585
*See* Adjustment of Shareholders' Rights.

**ASSETS**—Company—Surplus - - 59
*See* Distribution of Surplus Assets.

—— Partnership—Value of mill - - 25
*See* Partnership Assets.

—— Small amount of—Liquidation - 775
*See* Resolution for Liquidation.

—— Small amount of—Resolution for composition - - - - - 742
*See* Resolution for Composition.

**ASSIGNMENT OF ALL DEBTOR'S PROPERTY**—*Successive Renewals—Act of Bankruptcy—Past Debt—Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *s.* 6—*Bills of Sale Act*, 1854 (17 & 18 *Vict. c.* 36), *s.* 1.] A bill of sale of the whole of the mortgagor's property, given by way of renewal of a former one not registered, is, if no fresh advance be made by the mortgagee, an act of bankruptcy, and void as against the trustee in bankruptcy of the mortgagor, notwithstanding its registration in due time.—*Ramsden* v. *Lupton* (Law Rep. 9 Q. B. 17) explained.—*Ex parte Cohen* (Law Rep. 7 Ch. 20) followed. *Ex parte* Stevens. *In re* Stevens [786

**ASSIGNMENT OF DEBT**—Petitioning creditor's debt - - - - - 762
*See* Petition for Adjudication. 1.

**AUCTION**—*Opening Biddings—Misconduct in the Management of the Sale*—30 & 31 *Vict. c.* 48.] In order to entitle parties to open the biddings after a sale by auction under the Court since the passing of the *Sales of Land by Auction Act*, 1867, there must be either fraud or such misconduct as borders on fraud.—Consideration of the circumstances necessary to justify the presumption of such misconduct. Delves *v.* Delves - - 77

—— Contract signed by auctioneer—Statute of Frauds - - - - - 412
*See* Contract by Agent.

**AWARD**—Setting aside - - - 39
*See* Submission to Arbitration.

**BANKING ACCOUNT**—Joint names of husband and wife - - - - 328
*See* Advancement. 2.

**BANKRUPTCY**—Act of bankruptcy—Assignment of all debtor's property - - 786
*See* Assignment of all Debtor's Property.

—— Adjudication—Joint and several - 758
*See* Joint and Several Adjudications.

—— Adjudication without petition - 777
*See* Adjudication without Petition.

—— Appeal - - - - - - 143
*See* Bankruptcy Appeal.

—— Assignment of all debtor's property - 786
*See* Assignment of all Debtor's Property.

—— Composition with creditors—Resolution 742
*See* Resolution for Composition.

—— Costs—Liquidation - - - - 780
*See* Costs in Liquidation.

**BANKRUPTCY**—*continued.*

—— Fraudulent preference - - 65, 746, 763
*See* Fraudulent Preference. 1, 2, 3.

—— Joint and separate estates - - 767
*See* Joint and Separate Estates.

—— Jurisdiction - - - - 733, 772
*See* Bankruptcy Jurisdiction. 1, 2.

—— Liquidation—Resolution for - - 775
*See* Resolution for Liquidation.

—— Order and disposition - - - - 387
*See* Order and Disposition.

—— Petition for adjudication—Petitioning creditor's debt - - - - 762, 782
*See* Petition for Adjudication. 1, 2.

—— Receiver - - - - - 282, 291
*See* Receiver. 1, 2.

—— Secured creditor - - - - 273
*See* Creditor holding Security.

—— Undischarged debtor—Status of - 749
*See* Undischarged Debtor.

**BANKRUPTCY APPEAL**—*Practice—Time for Appealing—Bankruptcy Rules*, 1870, *rr.* 143, 150—*General Rule of* 26 *May*, 1873.] In computing the twenty-one days within which an appeal must be entered, Sundays are not to be reckoned. *Ex parte* Hicks. *In re* Ball - - - 143

**BANKRUPTCY JURISDICTION**—*Foreign Creditor resident Abroad—Effect of Proving Debt—Notice of Motion—Service out of Jurisdiction—Waiver of Irregularity—Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *ss.* 2, 72–76 — *Bankruptcy Rules*, 1870, *r.* 50.] A foreign creditor, residing out of the jurisdiction of the Court of Bankruptcy, by proving a debt in a bankruptcy or liquidation, brings himself within the general jurisdiction of the Court as to the administration of the estate, just as if he were residing within it. An order can therefore be made on him to restore property of the bankrupt or debtor improperly in his possession.—A notice of motion was served out of the jurisdiction on the Respondent. No order authorizing the service had been obtained from the Court. The Respondent appeared on the hearing of the motion, and objected to the jurisdiction of the Court. On his objection being overruled, he asked for and obtained an adjournment to enable him to answer the case on its merits:—*Held*, that there had been a mere irregularity in the service, and that it had been waived. *Ex parte* Robertson. *In re* Morton - - - - - 733

2. —— *Composition—Enforcing Provisions—Surety—Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *s.* 126.] The Court of Bankruptcy has no jurisdiction to enforce the payment of a composition by a surety who has covenanted with a trustee on behalf of the creditors for its payment.—If the surety fails to pay, it is the duty of the trustee to sue him at law on his covenant; and if the trustee neglects this duty, the Court of Bankruptcy has power to compel him to perform it. *Ex parte* Mirabita. *In re* Dale. - 772

**BENEFICE**—Presentation to—Will - 317
*See* Advowson.

**BENEFIT OF SURVIVORSHIP**—"Survivors" when read "others" - - 373
*See* Survivorship.

**BILL OF SALE**—Renewals of—Act of bankruptcy - - - - - - 786
*See* Assignment of all Debtor's Property.

**BOARD OF HEALTH**—Nuisance by - - 127
*See* Nuisance by Public Body.

**BOARD OF TRADE**—Application for provisional orders—Costs - - - - 17
*See* Taxation of Costs. 1.

**BORROWING POWERS**—*Company — Power to raise Money by issue of Debentures—Issue at Discount.*] By the articles of association of a company the directors were empowered (Art. 28) to borrow money, and (Art. 29) to secure the repayment of or raise any money authorized to be borrowed by them by the issue, on behalf of the company, of debentures, promissory notes, or bills of exchange, or in such other manner as they might deem expedient; and also (Art. 66) to exercise and do all such powers, directions, acts, deeds, and things as the company might exercise and do:—*Held*, that both under the special power conferred by Art. 29 and the general powers conferred by Art. 66 the directors had power to issue debentures at a discount. *In re* Anglo-Danubian Steam Navigation and Colliery Company - - - - - - 339

**BOX IN THEATRE**—*Lease of Theatre—Underlease of Stalls—User of Theatre for other than Theatrical Purposes—Derogation from Grant.*] The lease of a theatre contained a covenant on the part of the lessee not to convert the theatre, or any part thereof, to any other use than for acting or performing of operas, plays, concerts, balls, masquerades, assemblies, and such theatrical and other purposes as had been usually given therein. The lessee, for valuable consideration, sub-demised certain boxes and pit stalls, together with free and uninterrupted admission into, and egress and regress to and from, and the full use and enjoyment of such boxes and stalls during all such nights as the theatre should be open for the reception of audience or company to any public performance or exhibition of any opera or any entertainment whatsoever of or upon the stage, except balls or masquerades, to the Plaintiff for a term of years, reserving full right of access to the boxes and stalls for the purposes of repair. The underlease contained a covenant for quiet enjoyment of the demised premises; but no covenant on the part of the grantor of the underlease to observe or perform the covenants of the original lease. Afterwards the lessee of the theatre agreed to let it for a term of three months for the purpose of holding religious meetings. In order that the theatre might be converted into a convenient place for holding such meetings, the divisions between the boxes were removed, and the pit (including the site of the Plaintiff's stalls) was boarded over; but these alterations were not permanent, and the parties disclaimed any intention of using the theatre for religious services beyond the three months:—*Held*, that without the Plaintiff's consent the theatre could not be converted to other than theatrical purposes, nor could the original lessee, or any person claiming under him, enter on the Plaintiff's boxes or stalls: but that, under the circumstances, the proper remedy

**BOX IN THEATRE**—*continued.*
was in damages, and not by way of injunction. Leader *v.* Moody - - - - - 145

**BREACH OF TRUST**—Separate estate—Married woman - - - - - 321
*See* Separate Estate of Wife.

**BROTHERS AND SISTERS**—Brother *en ventre sa mère* - - - - - 647
*See* Gift on attaining Twenty-one.

**BUILDING**—Covenant to build house - 210
*See* Voluntary Settlement.

—— Erection by tenant - - - - 539
*See* Waste. 2.

**BYE-LAWS OF MANOR** - - - 403
*See* Compensation under Lands Clauses Act.

**CALLS**—Interest on—Calls made by liquidator
*See* Liquidator. [360

**CAPITAL AND INCOME**—Legacy not paid for several years—Tenant for life and remainderman - - - - 456
*See* Apportionment.

**CASES**—*Attwater* v. *Attwater* (18 Beav. 330) distinguished - - - - 186
*See* Restraint on Alienation.

—— *Baker* v. *Parson* (42 L. J. (Ch.) 228) dissented from - - - - - 166
*See* Devise of Legal Estate.

—— *Biel's Estate, In re* (Law Rep. 16 Eq. 577) distinguished - - - - 471
*See* Costs in Administration Suit.

—— *Bishop of London, Ex parte* (2 D. F. & J. 14) considered - - - 369
*See* Costs under Lands Clauses Act. 2.

—— *Cohen, Ex parte* (Law Rep. 20 Eq.) followed [786
*See* Assignment of all Debtor's Property.

—— *Edwards* v. *Edwards* (15 Beav. 357) overruled - - - - - - 220
*See* Death coupled with a Contingency. 1.

—— *Forbes* v. *Peacock* (1 Ph. 717) followed 348
*See* Charge of Debts.

—— *Harper, Ex parte* (Law Rep. 18 Eq. 539) explained - - - - - - 39
*See* Submission to Arbitration.

—— *Heath* v. *Crealock* (Law Rep. 10 Ch. 22) followed - - - - - 238
*See* Purchase for Value without Notice.

—— *Houston* v. *Hughes* (6 B. & C. 403) considered - - - - - 166
*See* Devise of Legal Estate.

—— *Ingram* v. *Soutten* (Law Rep. 7 H. L. 408) followed - - - - - 220
*See* Death coupled with a Contingency. 1.

—— *Land Credit Company of Ireland* v. *Lord Fermoy* (Law Rep. 5 Ch. 763) distinguished - - - - - 225
*See* Director's Liability.

**CASES**—*continued.*

—— *Manning* v. *Farquharson* (30 L. J. (Q.B.) 22) not followed - - - 1
*See* Prohibition. 1.

—— *Newbold and Metropolitan Railway Company, In re* (14 C. B. (N.S.) 405) explained - - - - 39
*See* Submission to Arbitration.

—— *O'Mahony* v. *Burdell* (Law. Rep. 7 H. L. 408) followed - - - - 220
*See* Death coupled with a Contingency. 1.

—— *Parrott* v. *Warsfield* (1 Jac. & W. 594) observed upon - - - - 304
*See* Legacy, Specific or General.

—— *Ramsden* v. *Lupton* (Law Rep. 9 Q. B. 17) explained - - - - 786
*See* Assignment of all Debtor's Property.

—— *Rhodes* v. *Airdale Drainage Commissioners* (Law Rep. 9 C. P. 508) explained 39
*See* Submission to Arbitration.

—— *Sharp's Patent, In re* (3 Beav. 245), considered - - - - 346
*See* Taking off the File.

—— *Stephens, Ex parte* (11 Ves. 24) explained 515
*See* Set-off in Equity. 2.

—— *Till, Ex parte* (Law Rep. 16 Eq. 97) explained
*See* Receiver. 1. [282

—— *United States of America* v. *Wagner* (Law Rep. 2 Ch. 582), followed - - 140
*See* Foreign State.

—— *Vulliamy* v. *Noble* (3 Mer. 593) explained
*See* Set-off in Equity. 2. [515

—— *Worthington* v. *Jefferies* (Law Rep. 10 C. P. 379) not followed - - - 552
*See* Prohibition. 2.

—— *Wylly's Trusts, In re* (28 Beav. 458), explained - - - - 561
*See* Trustees Relief Act.

**CASH UNDER CONTROL OF COURT** - 468
*See* Investment of Money in Court.

**CERTIFICATE**—Shipbuilder—Deposit of 746
*See* Fraudulent Preference. 2.

**CHARGE OF DEBTS**—*Will—Real Estate if Personalty insufficient—Sale—Notice of Payment of Debts—Vendor and Purchaser.*] A testator by his will, dated in 1858, gave all his real and personal estate to trustees upon trust out of the proceeds of his personal estate, or if and so far as the same should be insufficient then out of the proceeds of his real estate, to pay his debts; and as to a certain house belonging to him, to permit his widow to occupy it during widowhood, and on her second marriage or death to sell the same.—The usual decree for administration was made by the Court, and the Chief Clerk found that all the debts had been paid out of the personal estate. By an order subsequently made on further consideration of the cause, it was ordered (with the consent of the widow, who was still living), that the said house should be sold; and a contract for sale was entered into. The purchaser having objected that a good title could not be made:—*Held*, that the trustees had no power of sale, and

**CHARGE OF DEBTS**—*continued.*

that the objection was valid.—*Forbes* v. *Peacock* (1 Ph. 717) explained. Carlyon *v.* Truscott 348

**CHARGING ORDER**—1 *& 2 Vict. c.* 110, *ss.* 14, 15—*Infants' Relief Act*, 1874 (37 *&* 38 *Vict. c.* 62) —*Void Debt.*] A charging order under the Act 1 & 2 Vict. c. 110, ss. 14, 15, has no greater effect than an instrument of charge executed by the judgment debtor would have had.—Accordingly, where *D.*, after the passing of the *Infants' Relief Act*, 1874, obtained judgment by default against *O.* for a debt which was in fact for money lent by him to *O.* during *O.'s* infancy, and *D.* subsequently obtained a charging order upon a fund in Court belonging to *O.*:—*Held*, that inasmuch as the debt on which the judgment and charging order were founded was void, the charging order was inoperative. *In re* Onslow's Trusts - 677

**CHAIRMAN OF MEETING**—Authority of 383
*See* Suit by Shareholder. 1.

**CHARITY**—"Parishioner" - - - 606
*See* Election to Christ's Hospital.

—— Trust for parish - - - 483
*See* Trust for Parish.

**CHILD EN VENTRE SA MÈRE**—Gift to brothers and sisters - - - 647
*See* Gift on attaining Twenty-one.

**CHILDREN**—Advancement by portions - 155
*See* Advancement. 1.

**COLLATERAL AGREEMENT**—*Light and Air—Lessor and Lessee.*] An agreement to grant *A.* a lease, in a form set out in a schedule, of property in the City as soon as the house then in course of erection by *A.* on the property should be completed, contained a proviso that nothing therein contained should give *A.* a right to any easement which did not belong to the premises agreed to be demised as they then existed, nor any right of light and air derived from over the houses opposite (which belonged to the lessors). The lease subsequently granted was of the land together with the house erected thereon, and all lights, easements, and appurtenances thereto belonging, in accordance with the scheduled form:—*Held*, that the grant by the lease of lights and easements was controlled by the antecedent agreement, which was to be read as part of the lease; and that *A.* was not entitled to restrain the lessees of the opposite houses from building so as to obstruct the access of light and air to his premises from over such houses. Salaman *v.* Glover - - - - - 444

**CHOSE IN ACTION**—Married woman—Protection order - - - - 179
*See* Wife's Chose in Action. 1.

**CHRIST'S HOSPITAL**—Election to—*Bonâ fide* parishioner - - - - 606
*See* Election to Christ's Hospital.

**CLASS**—Brothers and sisters, forming one class [647
*See* Gift on attaining Twenty-one.

**COAL MINE**—License by tenant in common to get coal - - - - 84
*See* Waste. 1.

**CO-DEFENDANTS**—Costs of - - 459
*See* Costs of Co-Defendants.

**COMMON LANDS**—Compensation to copyholders —Lands Clauses Act - - 403
*See* Compensation under Lands Clauses Act.

**COMMUTATION MONEY**—Half-pay of naval officer - - - - - 534
*See* Covenant to settle.

**COMPANY**—Agent—Contract for—Sale - 412
*See* Contract by Agent.

—— Agreement with promoter — Indemnity against costs - - - 620
*See* Agreement to indemnify.

—— Borrowing powers - - - 339
*See* Borrowing Powers.

—— Director—Profit by—Paid-up shares 580
*See* Fiduciary Relation.

—— Director—Qualification - - 506
*See* Director's Qualification.

—— Distribution of surplus assets - - 59
*See* Distribution of Surplus Assets.

—— Inability to pay debts - - - 337
*See* Winding-up Petition. 2.

—— Interference with internal management 669
*See* Interference with Management of Company.

—— Leave to proceed after winding-up 162
*See* Leave to proceed after Winding-up.

—— Misrepresentation in prospectus - 114
*See* Misrepresentation in Prospectus.

—— Paid-up shares—Contract for - - 524
*See* Contract for paid-up Shares.

—— Shareholders' rights *inter se* - - 585
*See* Adjustment of Shareholders' Rights.

—— Suit by individual shareholders 383, 474
*See* Suit by Shareholder. 1, 2.

—— Survivorship of liability—Shares in joint names - - - - 585
*See* Joint and Several Liability. 2.

—— Winding-up petition - - 268, 337
*See* Winding-up Petition. 1, 2.

**COMPENSATION UNDER LANDS CLAUSES ACT**—*Common Lands—Distribution—Stint—By-laws—Lands Clauses Consolidation Act*, 1845, *s.* 104.] The copyhold tenants of a manor were entitled to common of pasture upon certain wastes and lammas lands subject to by-laws made by the homage, and such rights were preserved after enfranchisement. The last by-laws, made in 1835, provided that every copyholder and freeholder should be entitled to turn on one head of cattle for every £10 of annual value of his lands and tenements, provided that the whole number should not exceed thirty; and that every occupier of any copyhold or freehold lands should be entitled to turn on a certain number of cattle according to the rental or annual value of his lands and tenements. Portions of the common lands were taken compulsorily, and compensation for the rights of common was paid to a committee of the copyholders;—*Held*, that such compensation was divisible among the copyhold tenants of the manor and the freeholders within the manor according to the stint fixed by the first clause of the by-laws. Fox *v.* Amhurst - - - - - 403

**COMPENSATION UNDER RAILWAY CLEARING HOUSE ACT**—*Lands Clauses Act*, 1845, *s.* 68—*Ancient Lights—Railway Clearing House Extension Act* (37 *Vict. c.* xvi.)—*Compulsory Powers—Injunction.*] By the *Railway Clearing House Extension Act* (37 Vict. c. xvi.), which incorporated the *Lands Clauses Act*, 1845, the Railway Clearing Committee were empowered to take certain lands, and to erect thereon any buildings and works for the purpose of the clearing system. The Plaintiffs, the owners of a neighbouring house, filed a bill to restrain the erection of a building on land acquired under the Act, on the ground that it interfered with their ancient lights—*Held*, that the Clearing Committee could not be restrained by injunction, and that the Plaintiff's remedy was under sect. 68 of the *Lands Clauses Act*, 1845. Duke of Bedford *v.* Dawson - - 353

**COMPOSITION WITH CREDITORS**—Payment by surety - - - - - 772
*See* Bankruptcy Jurisdiction.

—— Resolution for—Small amount of assets 742
*See* Resolution for Composition.

**COMPULSORY POWERS**—Interference with ancient lights—Railway Clearing House Act - - - - - - 353
*See* Compensation under Railway Clearing House Act.

**CONDITION**—Not to sell out of the family 186
*See* Restraint on Alienation.

**CONDITIONS OF SALE**—*Specific Performance—Misleading and erroneous Conditions.*] Upon the sale of an estate one of the conditions was that the title to the beneficial ownership should commence with the will of *A. C.*, and the purchaser must assume that *A. C.* was at his death beneficially entitled to the property in fee simple free from incumbrances. *A. C.* had contracted before his death for the purchase of the property, but it was not till many years after his death that the title was made out, the property conveyed, and the purchase-money paid:—*Held*, that the purchaser was not bound by the condition of sale, and the vendor declining an open reference as to title, his bill for specific performance was dismissed with costs. Harnett *v.* Baker - - 50

**CONSENT**—Arbitration - - - 39
*See* Submission to Arbitration.

**CONSIDERATION**—Voluntary settlement - 210
*See* Voluntary Settlement.

**CONSOLIDATION OF PROCEEDINGS** — Bankruptcy - - - - - 758
*See* Joint and Several Adjudications.

**CONTEMPT OF COURT** — *Committal—Notice of Application — Computation of Time — Sunday — Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *s.* 114 —*Bankruptcy Rules*, 1870, *rr.* 178, 179.] Three clear days' notice must be given of an application to commit a person for contempt of Court, and if the last of the three days happens to be a Sunday it is not to be counted in the computation of the three days. *Ex parte* Ferrige. *In re* Ferrige 289

—— Disturbance of receiver's possession - 282
*See* Receiver. 1.

**CONTRACT**—Agent - - - - - 412
*See* Contract by Agent.

—— Paid-up shares - - - - - 524
*See* Contract for paid-up Shares.

**CONTRACT**—*continued.*
—— Promoter of company - - - 114
*See* Misrepresentation in Prospectus.
—— Substitution of—Impossibility - 100
*See* Substituted Contract.
—— To purchase mine - - - 373
*See* Receiver. 3.

**CONTRACT BY AGENT**—*Contract for Sale—Specific Performance—Company—Secretary—Authorized Agent—Statute of Frauds—Auctioneer.*] An agreement to sell property to the Plaintiff was signed for a company by the secretary, who was alleged to be their authorized agent. The agreement was made subject to conditions of sale, and it was alleged that the vendors therein described referred to the company. The conveyance was prepared for execution when the company was ordered to be wound up, and the liquidator repudiated the contract on the ground that the secretary was not an authorized agent for the purpose of sale:—*Held*, on demurrer, that the allegations in the bill were sufficient to shew that the secretary was the authorized agent for the purpose of executing the contract, both within the *Statute of Frauds* and the *Companies Act*, 1867.—*Semble*, that a contract signed by an auctioneer on behalf of an undisclosed proprietor is a valid contract under the *Statute of Frauds*. Beer *v.* London and Paris Hotel Company - - 412

**CONTRACT FOR PAID-UP SHARES**—*Winding-up—Contributory—Allottee of paid-up Shares—Contract in Writing by Articles of Association—Companies Act*, 1867 (30 & 31 *Vict. c.* 131), *s.* 25.] The articles of association of a limited company provided that the directors should offer for subscription certain debenture bonds, and that with each bond they should allot, by way of bonus to the lenders, fully paid-up shares of equal value to the amount of such bond. *F.*, who was already a member of the company, subscribed for some of the bonds, and bonus shares of equal nominal value were allotted to him and registered in his name as paid-up shares. The company was afterwards ordered to be wound up:—*Held*, that the articles of association did not constitute a contract in writing within sect. 25 of the *Companies Act*, 1867; that the requirements of that section had not been complied with, and that *F.* was liable as a contributory in respect of his bonus shares. *In re* Malaga Lead Company. Firmstone's Case [524

**CONTRIBUTION**—Directors of company 225
*See* Director's Liability.
**CONTRIBUTORY**—Agreement with promoter—Indemnity against costs - - 620
*See* Agreement to indemnify.
—— Director—Profit by—Paid-up shares - 580
*See* Fiduciary Relation.
—— Director—Qualification - - 506
*See* Director's Qualification.
—— Paid-up shares—Contract for - - 524
*See* Contract for paid-up Shares.
—— Shareholders' rights *inter se* - - 585
*See* Adjustment of Shareholders' Rights.
—— Survivorship of liability—Shares in joint names - - - - 585
*See* Joint and Several Liability.
**COPYHOLDS**—Common lands—Compensation under Lands Clauses Act - - 403
*See* Compensation under Lands Clauses Act.
—— Freeholds—Mixed devise—Legal estate 166
*See* Devise of Legal Estate.
**CORPORATION**—Foreign state—Made Defendants - - - - - 140
*See* Foreign State.
**CORPUS OR INCOME**—Annuity - - 269
*See* Annuity charged on Corpus.
**COSTS**—Abandoned railway - - - 197
*See* Abandonment of Railway.
—— Administration suit - - - 471
*See* Costs in Administration Suit.
—— Between co-Defendants - - 459
*See* Costs of Co-Defendants.
—— Chancery or Parliamentary scale - 17
*See* Taxation of Costs. 1.
—— Lands Clauses Act - 48, 369, 470, 605
*See* Costs under Lands Clauses Act. 1—4.
—— Liquidation by arrangement - - 780
*See* Costs in Liquidation.
—— Patent suit - - - - 632
*See* Taxation of Costs. 4.
—— Skilled witness - - - - 650
*See* Taxation of Costs. 5.
—— Summons under Vendor and Purchaser Act
*See* Wife's Chose in Action. 1. [179
—— Taxation of - - 17, 449, 452, 632, 650
*See* Taxation of Costs. 1—5.
—— Trustee Relief Act - - - 561
*See* Trustee Relief Act.

**COSTS IN ADMINISTRATION SUIT**—*Will—Construction—Testamentary Expenses.*] A direction in a will to pay testamentary expenses and debts includes the costs of an administration suit.—*In re Biel's Estate* (Law Rep. 16 Eq. 577) distinguished. Harloe *v.* Harloe - - - - 471

**COSTS IN LIQUIDATION**—*Liquidation—Insufficient Estate—Costs—Priority of Payment—Receiver—Debtor's Solicitor.*] The costs of the receiver under a liquidation petition ought to be paid out of the estate in priority to the costs of the debtor's solicitor.—The first charge on the assets is for the costs of realizing them.—A trustee in a liquidation who had paid the costs of the debtor's solicitor out of the assets, which were insufficient to pay both those costs and the costs of the receiver, was ordered to pay the receiver's costs personally. *Ex parte* Royle. *In re* Johnson - - - 780

**COSTS OF CO-DEFENDANTS**—*Equities between Co-Defendants.*] A decree for specific performance of a contract having been made against two Defendants in a suit which had been rendered necessary chiefly by the misconduct of one of them, viz., *T.*:—*Held*, that as between the two Defendants the costs ordered to be paid by both of them to the Plaintiff ought to be borne by the Defendant *T.*, and that the other Defendant should have liberty to apply in Chambers as to the payment to him by *T.* of such costs. Wilson *v.* Thomson [459

**COSTS UNDER LANDS CLAUSES ACT**—*Payment out of Court—Mortgagees—Tender of 40s. for Costs—Affidavit of Service.*] The rule that where incumbrancers are parties to a petition for the reinvestment in land of money paid into Court under the *Lands Clauses Act*, 40s. costs ought to be tendered to such parties at the time of service of the petition in order to discourage unnecessary appearances, applies to the case of payment out of Court of such moneys to persons entitled subject to incumbrances; but the Petitioners will be entitled to add to their costs of the petition, in addition to the 40s., a sum sufficient to cover the costs of an affidavit of service. *In re* Halstead United Charities - - - - - 48

2. —— *Practice—Lands Clauses Act—Reinvestment—Costs—Apportionment between several Parties.*] The rule that the costs of a reinvestment in land of funds paid into Court under the *Lands Clauses Act* by different bodies as the compensation money for land taken are to be borne equally by the different bodies does not apply where there is great inequality in the amounts of the different funds, but the costs will in that case be apportioned rateably between the different bodies.—*Ex parte Bishop of London* (2 D. F. & J. 14) considered. *Ex parte* Governors of St. Bartholomew's Hospital - - - - 369

3. —— *Practice—Lands Clauses Act*, 1845—*Interim Investment—Tenant for Life—Incumbrancers—Petition—Service—Costs.*] When a tenant for life petitions for the interim investment of purchase-moneys paid in by a railway company under the *Lands Clauses Act*, and for the payment to him of the dividends thereon when invested, it is not necessary for him to serve persons having charges on the inheritance prior to the life estate, and the costs of such parties, if served, will not be allowed as against the company. *In re* Morris' Settled Estates - - - - 470

4. —— *Lands Clauses Act, s.* 80—*Reinvestment in Land—Restricted Contract—Purchaser's Costs.*] When money paid into Court under the *Lands Clauses Act* is sought to be reinvested in land upon a contract which throws upon the purchaser costs of the purchase which in an open contract would be borne by the vendor, the costs directed to be paid by the company will be limited to those which in an open contract would be purchaser's costs. *Ex parte* Governors of Christ's Hospital 605

**COUNSEL**—Three counsel - - 452, 650
*See* Taxation of Costs. 3—5.

**COVENANT**—Debt and further advances—Petitioning creditor's debt - - 782
*See* Petition for Adjudication. 2.

—— To build house—Voluntary settlement 210
*See* Voluntary Settlement.

**COVENANT TO SETTLE**—*Marriage Settlement—After-acquired Property—Half-pay of Naval Officer—Commutation Money under Pensions Commutation Act*, 1871 (34 & 35 *Vict. c.* 36).] *D.*, by his marriage settlement, agreed that if he then was, or should during the intended coverture, at one time and from one source, become entitled to any real or personal property of the value of £100 or upwards for any estate or interest whatsoever, he and all necessary parties should execute and do such assurances and things as should be necessary for vesting the same in the trustees of the settlement.—*D.* was at the time of his marriage in receipt of half-pay (as lieutenant in the navy), which he subsequently commuted, under 34 & 35 Vict. c. 36, for £2175:—*Held*, that the commutation money was not bound by the agreement in the settlement. Churchill *v.* Denny - 534

**CREDITOR HOLDING SECURITY** — *Voting—Proof—Dividend—Valuation of Security—Right of Trustee to Surplus—Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *ss.* 16, 40—*Bankruptcy Rules*, 1870, *rr.* 99, 100, 101, 135, 272.] A secured creditor who, after the first meeting under a liquidation, proves for the balance of his debt less the assessed value of his security, is bound to pay over to the trustee any excess realized from the security beyond the assessed value: and this although the trustee does not object to the assessment or offer to redeem. *Ex parte* King. *In re* Palethorpe - - - - 273

—— Joint and separate estate - - 767
*See* Joint and Separate Estates.

**CROSS BILL**—Foreign state—Discovery - 140
*See* Foreign State.

**DAMAGES**—Contract become impossible - 100
*See* Substituted Contract.

**DEATH**—Arbitrator - - - - 100
*See* Substituted Contract.

—— Leaving children—Settlement - 711
*See* Death coupled with a Contingency. 2.

—— Presumption of - - - - 136
*See* Presumption of Death.

—— Without issue - - - - 220
*See* Death coupled with a Contingency. 1.

**DEATH COUPLED WITH A CONTINGENCY**—*Will—Construction—Tenant for Life—"Die without issue"—"Die leaving issue."*] Testatrix being possessed of separate property, gave and bequeathed to her husband all her real and personal property for her life, and after his death "to be divided amongst" her five children, share and share alike; "and if any of my children should die without issue, then that child or children's share shall be divided, share and share alike, among the children then living; but if any of my children should die leaving issue, then that child, if only one, should take its parent's share; if more than one, to be divided equally amongst them."—Testatrix left five children, all of whom survived the tenant for life. One died, leaving children:—*Held*, that her share went over to her children.—Afterwards another died, without issue:—*Held*, that his share went to the three surviving children.—The fourth rule in *Edwards* v. *Edwards* (15 Beav. 357), that a gift over in the event of death without issue takes effect only upon such a death in the lifetime of the tenant for life, has been abrogated by *O'Mahoney* v. *Burdett* (Law Rep. 7 H. L. 388) and *Ingram* v. *Soutten* (Law Rep. 7 H. L. 408). Olivant *v.* Wright - - - - 220

2. —— *Settlement—Death of Tenant for Life "leaving a Child or Children"—Trust for "the*

**DEATH COUPLED WITH A CONTINGENCY**—*continued.*

*Child or Children"—Death of Child after Twenty-one in lifetime of Tenant for Life—Vested Interest.*] By a settlement trustees were directed to hold trust funds upon trust to pay the income to *E. H.* for life, and after her death, "leaving a child or children," to transfer, pay, and make over the fund unto "all and every the child or children of the said *E. H.*, and the issue of such of the said children as might be then dead" (such issue to take the parent's share), equally between them if more than one, the shares of sons to be transferred and paid at the age of twenty-one, and the shares of daughters at that age or marriage. Five of the children of *E. H.* survived her, and attained twenty-one or married, and one son of hers attained twenty-one and died without issue in her lifetime:—*Held*, that although the trust only took effect in case some one child survived *E. H.*, the contingency upon which the trust took effect was not to be imported into the constitution of the class who were to take under the trust, and that the son who attained twenty-one and died in the lifetime of the tenant for life without issue took, nevertheless, a vested interest in the fund. *In re* Orlebar's Settlement Trusts [711

**DEBENTURES**—Power to raise money—Company
*See* Borrowing Powers. [389

**DEBT**—"*En autre droit*"—Set-off - - 29
*See* Set-off in Equity. 1.

—— Fraud—Set-off between joint and separate creditors - - - - 515
*See* Set-off in Equity. 2.

—— Infant—Charging order - - 677
*See* Charging Order.

**DEED**—Delivery—Escrow - - - 262
*See* Escrow.

**DEFECTIVE ASSSURANCE**—Statute of Limitations—Adverse possession - - 692
*See* Limitations, Statute of. 1.

**DELAY**—Mandatory injunction—Ancient lights
*See* Light and Air. 2. [500

—— Specific performance—Agreement for lease
*See* Agreement for Lease. [659

**DELIVERY**—Deed—Escrow - - 262
*See* Escrow.

**DEMURRER**—Defence not raised by - 492
*See* Uncertain Agreement.

**DEPOSIT**—Railway company—Abandonment of railway - - - - 197
*See* Abandonment of Railway.

—— Shipbuilder's certificate - - 746
*See* Fraudulent Preference. 2.

**DEPOSIT OF DEEDS**—Fraud of solicitor—Notice [233
*See* Purchase for Value without Notice.

**DESERTION**—Husband—Protection order 179
*See* Wife's Chose in Action. 1.

**DEVISE**—Freeholds and copyholds—Legal and equitable estate - - - 166
*See* Devise of Legal Estate.

**DEVISE**—*continued.*

—— Revocation of - - - - 428
*See* Revocation of Gift.

**DEVISE OF LEGAL ESTATE**—*Will—Mixed Devise of Freeholds and Copyholds—Legal or Equitable Estate.*] Devise of freeholds and copyholds to *A.* and *B.*, to hold the same to *A.* and *B.*, their heirs, executors, administrators, and assigns, upon trust during the life of *J.* to receive the rents thereof and pay the same to *J.* for life, or otherwise to permit *J.* to receive them; followed by a devise, after *J.'s* decease, to the use of the heirs of his body. The testator appointed *A.*, *B.*, and *J.* executors of his will, and declared that the receipts of his said trustees and executors for any money payable under the will should be a sufficient discharge to any person paying the same:—*Held*, that *J.* took a legal estate tail in the freeholds, and an equitable estate for life in the copyholds.—*Baker* v. *Parson* (42 L. J. (Ch.) 228) dissented from.—*Houston* v. *Hughes* (6 B. & C. 403) commented on. Baker *v.* White - - 166

**DIRECTOR**—Bill against - - - 383
*See* Suit by Shareholder.

—— Liability of - - - - 225
*See* Director's Liability.

—— Management of company—Calling meeting—Interference by Court - - 699
*See* Interference with Management of Company.

—— Qualification - - - - 506
*See* Director's Qualification.

—— Suit against - - - - 474
*See* Suit by Shareholder. 1.

**DIRECTOR'S LIABILITY**—*Contribution—Wrongdoers—Company—Ultrà Vires—Particeps Criminis.*] Shares of a company were (pursuant to an *ultrà vires* resolution of the board) purchased and transferred into the name of *A.*, a director, in trust for the company:—*Held*, that *A.* was entitled to contribution from the directors who concurred in the transaction, for calls which he had paid.—A local director present at a meeting in *London*, at which the minutes of the last meetings, when it was resolved to transfer the shares to a trustee for the company, were read and confirmed, though not present until after the commencement of the proceedings, and denying all knowledge of the resolution or transaction:—*Held* to have been affected with notice, and liable in respect of the transaction.—But another local director, present only at a subsequent meeting, at which the formal minute of approval of a transfer to *A.* was confirmed:—*Held* not to have been affected with notice, and not liable.—*Land Credit Company of Ireland* v. *Lord Fermoy* (Law Rep. 5 Ch. 763) distinguished. Ashhurst *v.* Mason. Ashhurst *v.* Fowler - - - 225

**DIRECTOR'S QUALIFICATION** — *Company — Winding-up—Contributory.*] Where the holding of a certain number of shares is a necessary qualification for a director, the mere acceptance of the office only involves an agreement to have the qualifying shares within a reasonable time after becoming director; and if a person accepting the office retracts the acceptance before the reasonable time for acquiring the shares has expired, and without having acted as director, he will not be fixed with the qualification in the event of the

**DIRECTOR'S QUALIFICATION**—*continued.*
company being afterwards wound up.—*K.* subscribed the memorandum of association for ten shares; he also subscribed the articles, which provided that the qualification of a director should be the holding of fifty shares; that *K.* and two other persons named should be the first directors; and that the office of a director should be vacated if he ceased to hold the prescribed number of shares. The company was advertised to the public, and within three days after the publication of the prospectus, in which *K.'s* name appeared in the list of directors, *K.* gave notice in writing to the secretary of his withdrawing from the company on the ground of alleged misrepresentations made to him by the promoter as to its character and objects; and he never acted as a director, nor applied for shares, nor were any shares allotted to him. The company was ordered to be wound up, and on an application by the official liquidator to place *K.* on the list of contributories for fifty shares, including the ten shares for which he signed the memorandum:—*Held*, under the circumstances, that *K.'s* name must be placed on the list for the ten shares only. *In re* Pelotas Coffee Company - - 506

**DISCLAIMER**—*Bankruptcy Act* (32 & 33 *Vict. c.* 71), *s.* 23—*Leaseholds—Rights of Third Parties—Underlease.*] The lessee of a house agreed to underlet a portion of it at less rent than he paid and taking a premium, and the provisions of the agreement differed in material respects from those of the lease. The underlessee paid the premium and took possession under the agreement. The lessee afterwards became bankrupt; his trustee in bankruptcy disclaimed the lease; and the lessor commenced an action of ejectment against the underlessee.—Upon bill filed by the underlessee to restrain the action of ejectment and compel the lessor to grant him a lease in accordance with the terms of his agreement with the lessee:—*Held*, that the underlessee had no equity to compel the lessor to grant him a lease in accordance with the terms of the underlease, and bill dismissed with costs. Taylor *v.* Gillott 682

**DISCLAIMER OF PATENT**—Taking off the file
*See* Taking off the File. [346

**DISCOUNT**—Issue of shares at discount - 339
*See* Borrowing Powers.

**DISCOVERY**—Foreign state - - - 140
*See* Foreign State.

**DISENTAILING DEED**—Payment out of Court without - - - - - 372
*See* Payment out of Court.

—— Protector - - - - - 194
*See* Protector of Settlement.

**DISTRIBUTION**—Period of - - - 342
*See* Gift to Two for their Lives.

**DISTRIBUTION OF SURPLUS ASSETS**—*Winding-up—Priority of Preference Shareholders.*] A company having power to increase its capital to such amount and upon such terms, and either with or without special privileges or preferences to the holders of the shares in such increased capital, as they should deem expedient, raised further capital by the issue of preference shares entitled to a preferential interest of 10 per cent. per annum; the amount of such shares to be repaid on six months' notice with 25 per cent. bonus, such payment of interest, repayment, and bonus to take place before any dividend, interest, or other money was payable to the original shareholders. The company was wound up, and after payment of debts there remained a surplus for distribution:—*Held*, that the company had conferred a preference as to capital, as well as dividend, upon the new shareholders, and that they were entitled to the surplus assets in priority to the original shareholders. *In re* Bangor and Portmadoc Slate and Slab Company - 59

**DISTRIBUTIONS, STATUTE OF**—*Construction of Will—Distribution among Relatives.*] Gift of residue to be distributed "to my relatives, share and share alike, as the law directs:"—*Held* to mean a distribution under the *Statute of Distributions, per stirpes* and not *per capita*. Fielden *v.* Ashworth - - - - - - 410

—— Advancement by portions - - 155
*See* Advancement. 1.

**DIVIDENDS**—Declaration of—Bankruptcy 767
*See* Joint and Separate Estates.

—— Payment of—Preference shares - 556
*See* Payment of Dividends.

**EASEMENT**—Collateral agreement—Lease 444
*See* Collateral Agreement.

**EAST INDIA STOCK**—Investment of money in Court - - - - 468
*See* Investment of Money in Court.

**ELECTION TO CHRIST'S HOSPITAL**—*Charity—"Parishioner"—Unqualified Candidate—Re-election.*] Under a scheme sanctioned by the Court for a charity entitling a parish to elect children for *Christ's Hospital*, it was provided that no child should be eligible unless born in the parish, or unless his or her parents, or one of them, should be, or should have been, parishioners or a parishioner of the parish:—*Held*, that the word "parishioner" must be construed in an honest and *bonâ fide* manner, and could not be applied to a person taking a small house temporarily for the mere purpose of obtaining a qualification:—*Held*, also, that where an unqualified candidate was elected after notice to the electors of such disqualification the votes were thrown away, and the opposing candidate, though having only a minority of votes, was duly elected. Etherington *v.* Wilson - - - - - 606

**"EN AUTRE DROIT"**—Debt—Set-off - - 29
*See* Set-off in Equity. 1.

**EQUITABLE SET-OFF** - - 29, 515, 644
*See* Set-off in Equity. 1, 2, 3.

**EQUITY OF REDEMPTION**—Purchase of by mortgagee—Devise—Revocation 428
*See* Revocation of Gift.

**EQUITY TO A SETTLEMENT**—*Insolvency of Husband.*] Where a husband, a journeyman carpenter, was in the receipt of wages not exceeding 12*s.* a week, and had to support a wife and six children, the Court settled the whole of an incoming fund, the property of the wife, but liable to the extent of the husband's interest to the

**EQUITY TO A SETTLEMENT**—*continued.*
claim of a creditor, upon the wife and children. *In re* Cordwell's Estate. White *v.* Cordwell [644

**ESCROW** — *Delivery to Stranger — Delivery to Grantee's Solicitor.*] The delivery to the solicitor of the grantee of an instrument executed by the grantor will not convert the instrument from an escrow into a deed, provided the delivery is of a character negativing its being a delivery to the grantee.—The definition of an escrow in *Shepard's* Touchstone (Pages 58, 59) explained. Watkins *v.* Nash - - - - - - 262

**ESTATE TAIL**—Protector of settlement - 194
*See* Protector of Settlement.

**EVIDENCE**—Presumption of death - 136
*See* Presumption of Death.

**EXECUTION**—Issue of—Winding-up petition by creditor - - - - 268
*See* Winding-up Petition. 1.

**EXECUTION CREDITOR**—Leave to proceed after winding-up - - - - 162
*See* Leave to proceed after Winding-up.

**EXECUTOR**—Debt due from—Debt "*en autre droit*" - - - - 29
*See* Set-off in Equity. 1.

**FAMILY SETTLEMENT**—Setting aside—Mistake - - - - - 698
*See* Setting aside Settlement.

**FELONY**—Forfeiture—Mixed fund—Accumulations - - - - - 255
*See* Accumulations.

**FIDUCIARY RELATION**—*Company—Directors—Agreement with Promoter—Adoption by Company—Acceptance of Shares from Promoter.*] Previously to the formation of a company an agreement was entered into between the promoter and a trustee on behalf of the company for the sale to the company of certain property, partly in consideration of cash and partly of fully paid-up shares. The promoter induced three gentlemen to become directors, promising to transfer to them fully paid-up shares as their qualification (which the articles fixed at five shares). These directors afterwards adopted the agreement on behalf of the company, and subsequently thirty shares (part of those forming the consideration for the purchase) were allotted to each of them upon the nomination of the promoter. The contract was registered prior to the allotment:—*Held*, upon the company being wound up, that all these shares must be treated as unpaid, and that the directors must be placed on the list of contributories for thirty shares each accordingly. *In re* Western of Canada Oil, Lands, and Works Company. Carling's Case 580

**FIXTURES**—Valuation of—Order to make—Specific performance - - - 511
*See* Mandatory Order.

**FORECLOSURE**—Decree—Delivery up of deeds [238
*See* Purchase for Value without Notice.

**FOREIGN CREDITOR**—Proving debt in bankruptcy—Jurisdiction - - 733
*See* Bankruptcy Jurisdiction.

**FOREIGN STATE**—*Jurisdiction—Republic—Corporate Defendants—Pleading—Discovery—Stay of Proceedings in original Suit.*] The proceedings in an original suit by a foreign government were stayed until the Plaintiffs in that suit had given the name or names of persons who could be made Defendant or Defendants in a cross suit by the same parties against the foreign government, for the purpose of making upon oath the discovery required.—*United States of America* v. *Wagner* (Law Rep. 2 Ch. 582) followed. Republic of Peru *v.* Weguelin. Weguelin *v.* Republic of Peru - - - - 140

**FORFEITURE FOR FELONY**—Mixed fund—Accumulations - - - - 255
*See* Accumulations.

**FRAUD**—Debt incurred by—Set-off—Joint and separate creditors - - - 515
*See* Set-off in Equity. 2.

—— Misrepresentation in prospectus - 114
*See* Misrepresentation in Prospectus.

**FRAUDS, STATUTE OF**—*Sale of Real Estate—Memorandum of Agreement—Description of Contracting Parties.*] An agreement for the sale of real estate did not disclose the names of the vendors, but it appeared therefrom that the vendors were a company in possession of the property offered for sale, and that they had carried on operations thereon:—*Held*, on demurrer, that the vendors were sufficiently described to satisfy the *Statute of Frauds*. Commins *v.* Scott - - 11

—— Contract signed by auctioneer - 412
*See* Contract by Agent.

**FRAUDULENT PREFERENCE** — *Liquidation — Composition — Undue Advantage by Creditors.*] A banker holding bills and acceptances as a security for advances made to a customer, took a guarantee from the brother of the customer that the loss of the bank should not exceed £2000. This transaction took place after the customer had commenced proceedings for the liquidation of his affairs, and unknown to his other creditors, with a view to prevent the bank from opposing a composition:—*Held*, upon a bill filed by the banker to enforce performance of the agreement, that the arrangement, which would have the effect of giving one creditor a secret advantage over the others, could not be sustained, and the bill was dismissed with costs. McKewan *v.* Sanderson - - - - - 65

2. —— *Act of Bankruptcy—Security given in fulfilment of prior Voluntary Promise—Equitable Mortgage of unfinished Ship—Deposit of Builder's Certificate — Consolidation of Mortgages—Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *ss.* 6 (*sub-s.* 2), 92.] In August *S.*, a shipbuilder, whose account current with his bankers was overdrawn, offered to give them security upon a ship which he was building. The bankers declined to accept the security then, but said that circumstances might arise to make it desirable that they should have it, and he promised to give it them when they wished it. On the 28th of September the offer was renewed, but the bankers urged him to sell the ship, and so prevent the necessity of their taking the security. On the 7th of October *S.* had an interview with them at the bank, and they told him that they would

**FRAUDULENT PREFERENCE**—*continued.*
accept the security, and that he was to lodge the builder's certificate of the ship with their manager. The next day he signed the certificate, and gave it to the bank manager. The certificate described the ship and her engines, and stated that she had been built for the bank manager. At this time she was not launched, but was in an unfinished state in the builder's yard. The engines were not on board, but were lying unfinished in the yard of the firm who were making them for the shipbuilder. On the 9th of October the shipbuilder had another interview with the bankers, when they told him they could advance him no more money, and did not see how he could go on, to which he assented; but they agreed to advance him £770 to pay his workmen's weekly wages, on the security of an assignment of a debt owing to him from another person, and told him that they could go no further, and that he had better consult his solicitor as to his position. On the 10th of October the manager endeavoured to get himself registered as the owner of the ship, but, as she was not launched, this could not be done. But he placed a man in possession of her, and fixed a notice upon her that she was his property. On the 10th of October *S.* paid his workmen, and then discharged them, and closed his place of business. On the 12th of October he filed a liquidation petition:—*Held*, that both the securities given to the bankers were valid as against the trustee in the liquidation, there not being in the transactions anything amounting to either a fraudulent preference or an act of bankruptcy: —*Held*, also, that the deposit of the builder's certificate created a good equitable mortgage of the unfinished ship, including the engines which were being built for her, but subject as to the engines to any lien for unpaid purchase-money to which the engine-builders might be entitled:—*Held*, also, that the assignment of the debt having been given after the insolvent position of *S.* was disclosed, was a security for the £770 only, and could not be made available by consolidation or otherwise to secure the past debt. *Ex parte* Hodgkin. *In re* Softley - - - 746

3. —— *Pressure — Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *s.* 92.] A creditor suggested to his debtor that the latter should buy goods on credit from other persons, and should with the proceeds of their sale pay off the debt due to the former. The debtor adopted the suggestion, and out of the proceeds of the sale of goods which he obtained on credit he made several payments on account of the debt. There was evidence that the payments were made under pressure from the creditor. The debtor afterwards filed a liquidation petition:—*Held*, that, as the transaction was fraudulent in its inception, it was immaterial that the payments were made under pressure, but that they must be set aside as being fraudulent preferences. *Ex parte* Reader. *In re* Wrigley 763

**FREEHOLDS AND COPYHOLDS**—Mixed devise —Legal estate - - - - 166
*See* Devise of Legal Estate.

**GARDEN**—Ornamental, in town—Right to restrain trespass - - - - 462
*See* Ornamental Garden.

**GENERAL ORDER, JAN., 1857, r. 3** - 449
*See* Taxation of Costs. 2.

**GENERAL RULES IN BANKRUPTCY, 1870,** r. 48 - - - - - 758
*See* Joint and Several Adjudications.

—— r. 50 - - - - - 733
*See* Bankruptcy Jurisdiction.

—— rr. 99, 100, 272 - - - - 273
*See* Creditor holding Security.

—— r. 143 - - - - - 3
*See* New Trial in Bankruptcy.

—— rr. 143, 150 - - - - 143
*See* Bankruptcy Appeal.

—— rr. 178, 179 - - - - 289
*See* Contempt of Court.

—— rr. 183, 185, 256 - - - 743
*See* Undischarged Debtor.

—— rr. 260, 299 - - - 282, 291
*See* Receiver. 1, 2.

—— r. 295 - - - - - 775
*See* Resolution for Liquidation.

—— r. 295 - - - - - 742
*See* Resolution for Composition.

**GENERAL RULES IN BANKRUPTCY, MAY, 1873**
*See* Bankruptcy Appeal. [143

**GENERAL WORDS**—Appointment under two special powers - - - 599
*See* Appointment under Special Powers.

**GIFT ON ATTAINING TWENTY-ONE** — *Will— Bequest to Brothers and Sisters at Twenty-one or Marriage—Brother in esse, but not born, at Death of Testatrix — Class when ascertained — After-born Brother excluded.*] Testatrix by will bequeathed residuary personal estate unto and equally between all her brothers and sisters, share and share alike. She directed that the shares of her brothers respectively should not vest in them respectively until they should respectively attain twenty-one, and that the shares of her sisters should not vest in them respectively until they should respectively attain that age or marry: —*Held*, that the testatrix's brothers and sisters formed one class only of persons; and that a brother not born, though *en ventre sa mère* when the eldest of the brothers and sisters who attained twenty-one came of age, was excluded; although he was born before the eldest of the brothers only who attained twenty-one came of age. *In re* Gardiner's Estate. Garratt *v.* Weeks - - - - - 647

**GIFT TO TWO FOR THEIR LIVES**—*Will—Gift of Income to Two—Words "at their Death"—Period of Distribution—Shares of Children.*] Bequest of residue, the interest thereof to be paid to *C.* and *J.* equally for their lives, and "at their death," the principal to be divided between the children of *C.* and *J.*:—*Held*, that the words "at their death" meant "at their respective deaths," and that, on the death of *C.*, the moiety to the interest of which *C.* had been entitled became divisible among his children. Wills *v.* Wills. [342

**GRANT**—Derogation from - - - - 145
*See* Box at Theatre.

**GUARANTEE**—Fraudulent preference—Liquidating debtor - - - - 65
*See* Fraudulent Preference. 1.

**GUARDIAN** — Concurrence of — Public Works Site Act - - - - 527
*See* Public Worship Sites Act.

**HALF-PAY**—Covenant to settle—Marriage settlement - - - - - 534
*See* Covenant to settle.

**HEIR OF LIVING PERSON**—Sale under Partition Act - - - - - 182
*See* Partition Suit. 2.

**HUSBAND AND WIFE**—Advancement of wife—Banking account in joint names - 328
*See* Advancement. 2.

—— Desertion—Protection order - - 179
*See* Wife's Chose in Action. 1.

—— Covenant to settle after-acquired property of husband - - - - 534
*See* Covenant to settle.

—— Equity to a settlement - - - 644
*See* Equity to a Settlement.

—— Reduction into possession—Assignment to trustees - - - - 789
*See* Rectification of Settlement. 2.

—— Separate estate—Breach of trust - 321
*See* Separate Estate of Wife.

—— Undertaking and purchase by married woman - - - - 528
*See* Partition Suit. 3.

—— Ward of Court—Settlement—Rectification [666
*See* Rectification of Settlement. 1.

—— Wife's *chose in action* - - 179, 454
*See* Wife's Chose in Action. 1, 2.

**IMPOSSIBLE CONTRACT** - - - 100
*See* Substituted Contract.

**INABILITY TO PAY DEBTS**—Company - 337
*See* Winding-up Petition. 2.

**INCOME**—Capital—Legacy not paid for several years—Tenant for life and remainderman
*See* Apportionment. [456

—— Corpus—Annuity - - - 269
*See* Annuity charged on Corpus.

—— Gift to two for their lives - - 342
*See* Gift to Two for their Lives.

**INDEMNITY**—Contract for—Promoters of company - - - - - - 620
*See* Agreement to indemnify.

**INFANT** — Guardian — Concurrence of — Public Worship Sites Act - - - 527
*See* Public Worship Sites Act.

—— Debt of—Charging order - - 677
*See* Charging Order.

**INFRINGEMENT OF PATENT**—Actual user—Injunction - - - - 37
*See* Patent Suit.

**INJUNCTION**—Directors—Management of company - - - - - 669
*See* Interference with Management of Company.

—— Improper use of street - - - 22
*See* Temporary Nuisance. 1.

—— Light and air - - - 494, 500
*See* Light and Air. 1, 2.

**INJUNCTION**—*continued.*

—— Light and air—Compulsory powers—Railway Clearing House Act - - 353
*See* Compensation under Railway Clearing House Act.

—— Nuisance—Ornamental garden in town 462
*See* Ornamental Garden.

—— Nuisance—Temporary - - 22, 539
*See* Temporary Nuisance. 1, 2.

—— Patent suit - - - - 37
*See* Patent Suit.

—— Pollution of stream - - - 626
*See* Pollution of Stream.

—— Theatre—Use for religious services - 145
*See* Box at Theatre.

—— Weekly tenant - - - - 539
*See* Temporary Nuisance. 2.

—— Winding-up—Enforcing lien on ship 325
*See* Injunction in Winding-up.

**INJUNCTION IN WINDING-UP** — *Company—Maritime Lien—Mode of enforcing Lien—Proceedings in Admiralty Court—Arrest of Vessel—Sequestration—Companies Act*, 1862 (25 & 26 *Vict.* c. 89), *s.* 163.] The proper mode of enforcing a maritime lien on a vessel belonging to a company which has been ordered to be wound up, is by a proceeding in the winding-up and not by a proceeding *in rem* in the Admiralty Court.—The arrest of a vessel by the Admiralty Court is a "sequestration" within the meaning of the *Companies Act*, 1862, s. 163. *In re* Australian Direct Steam Navigation Company - 325

**INROLMENT OF DECREE**—Winding-up—Leave to inrol - - - - 639
*See* Appeal in Winding-up.

**INSOLVENCY**—Evidence of - - - 337
*See* Winding-up Petition. 2.

**INTEREST**—Winding-up—Calls made by liquidator - - - - - 360
*See* Liquidator.

**INTERFERENCE WITH MANAGEMENT OF COMPANY**—*Injunction—Powers of Directors—Annual General Meeting—Voting Powers of Shareholders.*] Although the Court will not interfere with the powers and duties of directors in their management of the internal affairs of a company, directors will be restrained from fixing a particular date for holding the annual general meeting of the company for the purpose of preventing shareholders from exercising their voting powers. Cannon *v.* Trask - - - - 669

—— Bill by individual shareholders - 383
*See* Suit by Shareholder. 1.

**INTERIM INJUNCTION**—Patent suit - 37
*See* Patent Suit.

**INVESTMENT**—Lands Clauses Act—Costs 470
*See* Costs under Lands Clauses Act. 3.

—— Money in Court—Lands Clauses Act 468
*See* Investment of Money in Court.

**INVESTMENT OF MONEY IN COURT**—*Lands Clauses Consolidation Act*, 1845, *ss.* 69, 70—*Interim Investment—Cash under the Control of the Court—East India £4 per Cent. Stock.*] Purchase-money paid into Court in respect of land taken by

**INVESTMENT OF MONEY IN COURT**—*contd.*
a railway company under the *Lands Clauses Consolidation Act*, 1845, is cash under the control of the Court, and accordingly the Court has power to direct the investment thereof in *East India* £4 per Cent. Stock.—*In re Boyd's Settled Estate* considered. *In re* Fryer's Settlement. Fryer *v.* Salisbury and Dorset Junction Railway Company - - - - - - 468

**IRREGULARITY**—Waiver of—Notice of motion
*See* Bankruptcy Jurisdiction. [733

**JOINT AND SEPARATE ADJUDICATIONS**—*Consolidation of Proceedings—Adjudication under the Joint Petition only—Locus Standi of Bankrupt to oppose Consolidation—Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *ss.* 80 (*sub-s.* 2) 102—*Bankruptcy Rules*, 1870, *r.* 48.] An adjudication of bankruptcy was made upon a petition presented against two partners in trade. A petition had been previously presented by the same creditor against one of the partners separately, and some proceedings had been taken under it, but no adjudication had been made:—*Held*, that there was power to order the proceedings under the separate petition to be consolidated with those under the joint petition:—*Held*, also, that the bankrupt had no *locus standi* to oppose the consolidation. *Ex parte* Mackenzie. *In re* Hellewell - - - - - - - 758

**JOINT AND SEPARATE CREDITORS**—Set-off between - - - - - 515
*See* Set-off in Equity. 2.

**JOINT AND SEPARATE ESTATES**—*Declaration of Dividends — Application for Declaration of Dividend on Joint Estate before Separate Estate—Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *s.* 104—*Creditor holding Security on Separate Estate for Joint and Separate Debts—Right to appropriate Produce of Security—Proof.*] A creditor of two partners was also a creditor of one of the partners separately, and the title-deeds of separate estate of that partner were deposited with him to secure both the joint and the separate debts. The two partners filed a joint liquidation petition, and the partner whose separate estate was mortgaged also filed a separate liquidation petition. The security having been realized:—*Held*, that the creditor was entitled to apportion the produce of the realization between his joint and separate debts in whatever way was most for his advantage, and that, to enable him to exercise this option, he was entitled to apply to the Court under sect. 104 of the *Bankruptcy Act*, 1869, to have a dividend on the joint estate declared before the declaration of a dividend on the separate estate. *Ex parte* Dickin. *In re* Foster [767

**JOINT AND SEVERAL LIABILITY**—*Partnership—Agreement as to Payment by Surviving Partners of Deceased Partner's Share.*] By an agreement between *A.*, *B.*, *C.*, and *D.*, four partners in a mercantile business, after reciting, amongst other things, that all the partners had considerable sums of money employed in the business as floating capital, which it might be impracticable or highly detrimental for the others of them to repay or advance from the said business immediately after the retirement or decease of either of them,

**JOINT AND SEVERAL LIABILITY**—*continued.*
it was agreed between and by *A.*, *B.*, *C.*, and *D.*, that in case of either of them retiring from the co-partnership business, or departing this life during the continuance thereof, then and in such case the continuing or surviving partners or partner should not be compelled by such retiring partner, or by the executors or administrators of such deceased partner, to repay to him or them his or their share in the said co-partnership business immediately, but the clear balance, as ascertained from the last stock-taking, due to such retiring or deceased partner, together with any additional capital (if any), should be repaid out of the business by the continuing or surviving partners by instalments, as therein mentioned, until the whole amount should be fully paid or discharged, unless the surviving or continuing partners should wish to pay such share or balance at an earlier period, which they were to be at liberty to do:—*Held*, that the agreement was merely an arrangement as to the mode of discharging a pre-existing joint and several liability, and was not intended to alter the nature of the liability:—*Held*, further, that if the agreement did create a new liability, such new liability arising out of a contract by a mercantile partnership was in equity several, and not joint merely. Beresford *v.* Browning. Browning *v.* Beresford - - - 564

2. —— *Shares Registered in Two Names.*] Shares having been registered in the joint names of two persons, one of whom was since dead, the articles of association being silent as to the liability thereby incurred:—*Held*, that by the *Joint Stock Companies Act*, 1856, a joint liability only was contracted, and that it survived on the death of the joint owner. The survivor was therefore alone liable to be placed on the list of contributories. *In re* Maria Anna and Steinbank Coal and Coke Company. Hill's Case - 585

**JOINT NAMES** — Banking account — Husband and wife - - - - 328
*See* Advancement. 2.

**JUDGMENT CREDITOR**—Winding-up petition—Issue of execution - - - 268
*See* Winding-up Petition. 1.

**JURISDICTION** — Appointment of guardian — Public Worship Sites Act - 527
*See* Public Worship Sites Act.

—— Bankruptcy - - - 733, 772
*See* Bankruptcy Jurisdiction. 1, 2.

—— Bill by foreign state—Cross bill—Discovery
*See* Foreign State. [140

—— Lord Mayor's Court—Prohibition - 1
*See* Prohibition. 1.

—— Prohibition to restrain proceedings in Mayor's Court - - - 552
*See* Prohibition. 2.

—— Taking off the file—Disclaimer of patent
*See* Taking off the File. [346

**LANDLORD AND TENANT** — Collateral agreement as to easement - - 444
*See* Collateral Agreement.

—— Waste—Erection of building by tenant 539
*See* Waste. 2.

**LEASE**—Agreement for - - - 659
*See* Agreement for Lease.
—— Agreement for—Collateral agreement as to light and air - - - 444
*See* Collateral Agreement.
—— Disclaimer of—Trustee—Bankruptcy 682
*See* Disclaimer.
—— Theatre—Underlease of boxes and stalls
*See* Box at Theatre. [359, 145

**LEAVE TO PROCEED AFTER WINDING-UP**—*Winding-up—Company—Proceedings by Creditor—Winding-up Order—Leave to issue Execution—Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *ss.* 87, 163.] A company against which a writ had been issued under the *Bills of Exchange Act* obtained leave to defend the action upon affidavit made by their secretary containing statements to the effect that the Plaintiff in the action was a holder of a stolen bill, and had not given value for it; and that to his (the secretary's) knowledge the company was perfectly solvent. After the Plaintiff had been interrogated in the action, the defence was abandoned and judgment signed; but before the Plaintiff issued execution he received notice that the company had presented a winding-up petition. An order having been made on the petition, the judgment creditor applied for leave to issue execution, on the ground that he had been unfairly delayed in prosecuting his action:—*Held*, that the case was not one in which leave ought to be given.—Whether leave ought to be given in any case where execution has not been issued previously to the winding-up order, *quære*.—The *Companies Act*, 1862, ss. 87, 163, commented on. *In re* Universal Disinfector Company - - - - - 162

**LEGACY**—Debt—Set-off - - - 29
*See* Set-off in Equity. 1.
—— Married woman—Protection order - 179
*See* Wife's Chose in Action. 1.

**LEGACY, SPECIFIC OR GENERAL** — *Specific Legacy defined—Gift of "all my Stock in the Midland Railway Company"—Wills Act* (1 *Vict. c.* 26), *s.* 24—*Charge on Property specifically bequeathed—Redemption or Compensation.*] Legacies which before the passing of the *Wills Act* would have been specific, remain specific.—A gift of "all my stock in the *Midland Railway Company*" is specific.—A specific legatee is entitled to have his legacy redeemed from charges created by the testator (as distinguished from charges incidental to the property) at the expense of the testator's general estate, or, if the property is not redeemed, to have compensation out of the general estate to the amount of the legacy.—A testator by his will, dated in 1869, made a bequest of "all my shares or stock in the *Midland Railway Company*" to trustees upon certain trusts. He was at the date of his will entitled to £1000 stock in that company. In February, 1871, he transferred the stock into the names of certain bankers to secure an advance made by them to *A.*, who gave the testator an undertaking that the stock should be re-transferred within three months. The testator died in 1872; and after his death the bankers sold the stock (which had never been re-transferred) and applied the proceeds in reduction of the debt due from *A.* Under orders made in a suit to administer the testator's estate, *A.* transferred £500 *Midland Railway* stock into Court, but was unable to make any further transfer:—*Held*, that the trustees of the aforesaid bequest were entitled to the stock so transferred into Court, and not the residuary legatee.—Definition of specific legacy.—*Parrott* v. *Worsfold* (1 Jac. & W. 594) observed upon. Bothamley *v.* Sherson 304

**LEGACY, SPECIFIC OR GENERAL**—*continued.*

**LEGAL ESTATE**—Devise of - - - 166
*See* Devise of Legal Estate.

**LESSEE AND LESSOR**—Disclaimer by—Trustee in bankruptcy - - - 682
*See* Disclaimer.

**LIABILITY**—Director - - - 225
*See* Director's Liability.
—— Joint and several - - 544, 585
*See* Joint and Several Liability. 1, 2.
—— Limitation of—Special contract in articles of association - - - 585
*See* Adjustment of Shareholders' Rights.
—— Separate estate—Married woman - 321
*See* Separate Estate of Wife.

**LICENSE**—Tenant in common - - 84
*See* Waste. 1.

**LIEN**—Ship—Enforcing of, in winding-up 325
*See* Injunction in Winding-up.

**LIGHT AND AIR** — *Injunction — Angle of* 45°.] Where a building was being erected in a somewhat narrow street in the City of *London*, and had already reached a height which would subtend an angle of 45° at the foot of the ancient lights of the Plaintiff's houses on the opposite side of the street:—*Held*, that the Plaintiff was entitled to an injunction restraining the raising the new building to a greater height. Hackett *v.* Baiss - - - - - 494

2. —— *Obscuration—Mandatory Injunction—Damages under Lord Cairns' Act* (21 & 22 *Vict. c.* 27)—*Delay and Acquiescence.*] In a suit by the owner and occupier of a house and workshop complaining of the obscuration of his ancient lights by the Defendant raising a low party wall distant only eight feet from his windows to a height of twenty-six feet:—*Held*, that as the Plaintiff had not lost his right to relief by delay or acquiescence, he was entitled to a mandatory injunction for the removal of the additional building.—The circumstances under which the Court will grant a mandatory injunction instead of damages under *Lord Cairns' Act* (21 & 22 Vict. c. 27) considered. Smith *v.* Smith - - 500
—— Collateral agreement as to—Lease - 444
*See* Collateral Agreement.
—— Temporary obstruction — Improper use of street - - - - 22
*See* Temporary Nuisance. 1.

**LIMITATIONS, STATUTE OF**—(3 & 4 *Will.* 4, *c.* 27), *s.* 23—*Tenant in Tail—Defective Assurance—Substituting Life Estates — Possession.*] Lands limited in equity to *T.*, *F.*, and *F.'s* wife *E.* successively for life, with remainder to the first and other sons of *F.* and *E.* successively in tail male, with remainder to *F.* in tail general, with remainders over, were in the year 1835, without the consent of *T.*, the protector of the settlement, by deed inrolled, re-

**LIMITATIONS, STATUTE OF**—*continued.*
citing, contrary to the fact, the seisin in fee simple of *F.*, conveyed by *F.*, *E.* joining to transfer or bar her dower, to a purchaser in fee simple; and the purchaser then entered into possession. *T.* died in 1848, *F.* died without issue in 1859, and *E.* died in 1873:—*Held*, that until 1873 the possession of the purchaser was a possession by virtue of the subsisting life estates, and not of the estate tail in remainder of *F.*, and, consequently, was not a possession the continuance of which for the period of twenty years would, under the 23rd section of the *Statute of Limitations*, bar the remainders over. Mill *v.* Capel [692

2. —— *Dissolution of Partnership—Debt due from Solicitors and General Agents to Client—Part Payment by continuing Partner—Statutes of Limitation—Express Trust—Mercantile Law Amendment Act*, 1856.] After a dissolution of partnership, by which the continuing partner covenanted *inter alia* to pay the debts and to pay the retiring partner a sum equal to half the next half-year's profits:—*Held*, that part payment of a debt by the continuing partner during the said half-year could not be set up against the retiring partner as an answer to the *Statutes of Limitation*:—*Held*, also, that though the debt was from solicitors to a client in respect of moneys received, there was no express trust to exclude the operation of the statutes. Watson *v.* Woodman - - 721

—— Costs of obtaining Act—Abandonment—Railway - - - - 197
*See* Abandonment of Railway.

—— Debt barred by—Set-off against share under intestacy - - - - 644
*See* Set-off in Equity. 3.

—— Heir-at-law—Revoked devise - 428
*See* Revocation of Gift.

**LIQUIDATION BY ARRANGEMENT**—Costs 780
*See* Costs in Liquidation.

—— Fraudulent preference - - 65
*See* Fraudulent Preference. 1.

—— Receiver and manager - - 291
*See* Receiver. 2.

—— Resolution for - - - - 775
*See* Resolution for Liquidation.

—— Subsequent bankruptcy - - 777
*See* Adjudication without Petition.

—— Undischarged debtor—Second liquidation petition - - - - 743
*See* Undischarged Debtor.

**LIQUIDATOR** — *Winding-up — Appointment of Liquidators—Notice of Meeting—Interest on unpaid Calls.*] After a winding-up resolution has been passed liquidators may be appointed at a meeting without special notice of the intention to propose their appointment.—Provisions in articles as to interest on calls do not apply to calls made by liquidators. *In re* Welsh Flannel and Tweed Company - - - - - 360

**LORD MAYOR'S COURT**—Prohibition - 1, 552
*See* Prohibition. 1, 2.

**LOWER SCALE OF COSTS** - - - 449
*See* Taxation of Costs. 2.

**MANAGER**—Mine—Contract to purchase—Suit to rescind - - - - 373
*See* Receiver. 3.

**MANDATORY INJUNCTION** — Delay—Ancient lights - - - - 500
*See* Light and Air. 2.

**MANDATORY ORDER**—*Vendor and Purchaser—Agreement for Sale of Fixtures at Valuation by Person named—Specific Performance—Interlocutory Application.*] Where an agreement has been entered into for the sale of a house at a fixed price, and of the fixtures and furniture therein at a valuation by a person named by both parties, and he undertakes the valuation, but if refused permission by the vendor to enter the premises for that purpose, the Court will make a mandatory order to compel the vendor to allow the entry to enable the valuation to proceed.—The Court has jurisdiction to make any interlocutory order which is reasonably asked as ancillary to the administration of justice at the hearing. Smith *v.* Peters [511

**MARRIAGE SETTLEMENT**—Covenant to settle—Property of husband - - 534
*See* Covenant to settle.

—— Rectification of - - 666, 789
*See* Rectification of Settlement. 1, 2.

**MEETING OF SHAREHOLDERS**—Discretion as to calling—Interference of Court - 669
*See* Interference with Management of Company. 1.

**MILL**—Value of—Partnership - - 25
*See* Partnership Assets.

**MINE**—Contract to purchase—Suit to rescind 373
*See* Receiver. 3.

—— License by tenant in common to get coal 84
*See* Waste. 1.

**MISCONDUCT**—Management of sale—Opening biddings - - - - 77
*See* Auction.

**MISLEADING CONDITIONS OF SALE** - 50
*See* Conditions of Sale.

**MISREPRESENTATION IN PROSPECTUS**—*Companies Act*, 1867, *s.* 38—*Antecedent Contract—Promoter.*] In July, 1873, *A.* agreed to purchase a patent from *B.* for £65,000, payable partly in cash and partly by an allotment of shares in a company to be formed for working the patent, with a stipulation that *A.* should with as little delay as possible use his best endeavours for the formation of such a company. In October, 1873, *A.* agreed with *C.*, as a trustee for the intended company, for the sale to him of the patent for £125,000, payable in cash and shares, with a proviso that *A.* should be appointed managing director. The company, of which *A.* became a director, was formed in November, 1873, and a prospectus was issued containing no mention of *A.'s* contract with *B.*—Upon motion by a person who had applied for shares after seeing the prospectus, for removal of his name from the register, on the ground that the omission from the prospectus of the contract by which *A.* as a promoter purchased *B.'s* patent for the purposes of the company was fraudulent under the *Companies Act*, 1867, s. 38:—*Held*, that as *A.* had not been shewn at the date of his contract with *B.* to have been a promoter of, or in

**MISREPRESENTATION IN PROSPECTUS**—*contd.*
a fiduciary position towards the company afterwards formed, the omission from the prospectus of all notice of that contract was not fraudulent within the meaning of the *Companies Act*, 1867, s. 38.—*Semble*, that if *A.* had been an actual promoter of the company at the time of the contract, so as to bring the case within sect. 38, the remedy given by that section for fraudulent omission was against the delinquent promoter, &c., personally, and not against the company by removing the name of the shareholder, who had taken his shares on the faith of the prospectus, from the register: —*Held*, also, independently of the *Companies Act*, 1867, that neither the omission from the prospectus of the agreement with *B.*, nor the increased price charged by *A.* on his sale to the company of *B.*'s patent afforded any ground, under the *Companies Act*, 1862, s. 35, for releasing shareholders who took their shares in ignorance of these circumstances. *In re* Coal Economising Gas Company. Gover's Case - - - 114

**MISTAKE**—Settlement—Rectification 666, 789
*See* Rectification of Settlement. 1, 2.

—— Settlement—Setting aside - - 698
*See* Setting aside Settlement.

**MODELS**—Costs of making—Patent suit - 632
*See* Taxation of Costs. 4.

**MORTAR-MILL**—Nuisance—Railway company [544
*See* Nuisance by Railway Company.

**MORTGAGE**—Devise of mortgage estates—Purchase of equity of redemption - 428
*See* Revocation of Gift.

—— Equitable—Unfinished ship - - 746
*See* Fraudulent Preference. 2.

—— Fraud of a solicitor—Deposit of deeds—Notice—Priority - - - 238
*See* Purchase for Value without Notice.

—— Land taken under Lands Clauses Act—Payment out of Court—Costs - 48
*See* Costs under Lands Clauses Act. 1.

—— Stock in company — Specific bequest — Ademption - - - - 304
*See* Legacy, Specific or General.

**NECESSARY LANDS**—Reservation of—Uncertainty - - - - 492
*See* Uncertain Agreement.

**NEW TRIAL IN BANKRUPTCY**—*Time—Bankruptcy Rules*, 1870, *r.* 143.] Where a jury have found a verdict on an issue of fact, but no order consequent thereon has been made by the Judge, it is not necessary that an application for a new trial should be made within twenty-one days from the finding.—Rule 143 of the *Bankruptcy Rules*, 1870, does not apply to such a case, either directly or by analogy. *Ex parte* Reader, *In re* Wrigley [763

**NEXT OF KIN**—Set-off—Debt barred by statute
*See* Set-off in Equity. 3. [644

**NON-TRADER**—Petition for adjudication of bankruptcy - - - - 782
*See* Petition for Adjudication.

**NOTICE**—Application to commit—Completion of time—Sunday - - - 289
*See* Contempt of Court.

—— Fraud of solicitor—Deposit with banker [238
*See* Purchase for Value without Notice.

—— Meeting of shareholders—Appointment of liquidator - - - - 360
*See* Liquidator.

—— Motion—Out of jurisdiction - - 733
*See* Bankruptcy Jurisdiction. 1.

—— Payment of debts—Purchase from trustees
*See* Charge of Debts. [348

—— Proceeding—Metropolis Management Act
*See* Pollution of Stream. [626

—— Ultrà Vires Act - - - 225
*See* Director's Liability.

**NUISANCE**—Ornamental garden in town — Injunction - - - - 462
*See* Ornamental Garden.

—— Railway company—Necessary works 544
*See* Nuisance by Railway Company.

—— Public body—Board of Health - 127
*See* Nuisance by Public Body.

—— Temporary - - - 22, 539
*See* Temporary Nuisance. 1, 2.

**NUISANCE BY PUBLIC BODY**—*Contract between Local Board of Health and a Sewage Company—Alleged Breach of Covenant—Public Nuisance—Bill for Injunction—Demurrer—Control of Engineering Works by the Court — No allegation of Private Injury — Absence of Attorney-General — Demurrer overruled.*] A local board of health entered into an agreement with a sewage company, in pursuance of which they afterwards granted a lease to the company of the sewage works of a town, and of a plot of land, for a term of fourteen years, the company covenanting that they would during the term keep the outfall of the works, with the engines, pumps, and apparatus, in proper working order, so as to admit of the free flow of the sewage through the sewers communicating with the works, and so that the same might not at any time be stopped.—To a bill by the local board against the company, complaining that the company's works were insufficient to treat the sewage successfully, that they were pumping only a portion of the sewage out of the sewers, and were damming up or heading back the residue in the sewers, so as to be a nuisance to the inhabitants of the town, and that the Plaintiffs were being threatened with proceedings, and praying for an injunction to restrain the Defendants from permitting the sewage to remain in the sewers, so as to be a nuisance or damage to the Plaintiffs, and from damming up or heading back the sewage in the sewers, the Defendants demurred, on the grounds that the Court could not superintend the proper performance of the works; that the Plaintiffs had alleged no special damage; and that it was not the practice of the Court to restrain the infringement of a public right at the suit of a corporation, except at the instance or in the presence of the Attorney-General.—Demurrer overruled; and injunction granted. Nuneaton Local Board *v.* General Sewage Company - - 127

**NUISANCE BY RAILWAY COMPANY**—*Erection of Mortar-mill — Injunction — Railways Clauses Consolidation Act*, 1845 (8 *Vict. c.* 20), *ss.* 16, 32.] The words "purposes aforesaid," in sect. 32 of the *Railways Clauses Consolidation Act*, 1845, refer only to the purposes mentioned in that section. The remedy against the company in such cases may be by suit for injunction as well as by action for damages. An Act is not "necessary" within the 16th section of the said Act, merely because it enables the company to execute their works more economically.—Where a railway company for the construction of their works erected a mortar-mill on part of their land close to the place of business of the Plaintiff, who complained of the injury and annoyance occasioned by the noise and vibration: —*Held*, that the mortar-mill was not necessary for the construction of the line, and an injunction granted accordingly. Fenwick *v.* East London Railway Company - - - 544

**ONUS PROBANDI**—Presumption of death—Absence for seven years - - 136
*See* Presumption of Death.

**OPENING BIDDINGS**—Misconduct in sale 77
*See* Auction.

**ORDER AND DISPOSITION** — *Partnership — Decree for Dissolution—Purchase of Business by one Partner — Possession under the Order of the Court—Consent of the True Owner.*] By the decree in a suit a partnership between the Plaintiff and Defendant was dissolved, and the business and partnership property were ordered to be sold as a going concern, either party being at liberty to bid. Under a subsequent order the Plaintiff became the purchaser, he having in the meantime been carrying on the business for the benefit of the purchaser. Under the order approving of the purchase by him he was allowed to go into possession at once as purchaser. He continued in possession for some time, and ultimately became bankrupt:—*Held*, that under the circumstances the business and partnership property were in the order and disposition of the bankrupt with the consent of the true owner. Graham *v.* McCulloch - 397

**ORNAMENTAL GARDEN**—*Contract with Agent of Lessees of Houses—Right of Owners in Fee—Breach of Contract—Equitable Jurisdiction—Injunction.*] The owner in fee of a garden over which the tenants of his adjoining houses had rights of enjoyment and management: — *Held* entitled to an injunction to restrain continuing trespasses involving nuisances in the garden committed by a person acting under colour of a contract to improve the garden entered into between him and the tenants. Allen *v.* Martin - 462

**"PARISHIONER"**—Meaning of—*Bona fides* 606
*See* Election to Christ's Hospital.

**PARLIAMENTARY SCALE OF COSTS** - 17
*See* Taxation of Costs. 1.

**PART PAYMENT**—Statute of Limitations—Continuing partner - - - 721
*See* Limitations, Statute of. 2.

**PARTICEPS CRIMINIS**—Directors of company
*See* Director's Liability. [225

**PARTIES**—Attorney-General—Public and private injury - - - - 127
*See* Nuisance by Public Body.

**PARTIES**—*continued.*

—— Contract—Description—Statute of Frauds
*See* Frauds, Statute of. [11

**PARTITION SUIT**—*Sale—Immediate Decree — Parties declared Trustees — Interests of Unborn Issue—Form of Declaration—Trustee Act*, 1850 (13 & 14 *Vict. c.* 60), *s.* 30—*Partition Act*, 1868 (31 & 32 *Vict. c.* 40), *s.* 7.] Where real estate was held by a complicated title under which the parties interested were very numerous and unborn issue might become entitled to legal estates:—*Held*, that all persons in existence who were interested in the estate being parties to a suit for partition, and the title being proved at the hearing, an immediate decree for sale might be made without any preliminary inquiry; that a declaration might be made that the parties to the suit were, and that unborn issue upon coming into existence would be, trustees of their shares and interests within the meaning of the *Trustee Act*, 1850; but that the appointment of a new trustee and consequent vesting order, ought to be the subject of a subsequent application, and ought not to be made by the decree. Lees *v.* Coulton. Lees *v.* Clutton - - - - - 20

2. —— *Sale—Limitation to Heirs of "Unborn Person" — Partition Act*, 1868 (31 & 32 *Vict. c.* 40), *s.* 7—*Trustee Act*, 1850 (13 & 14 *Vict. c.* 60), *s.* 30.] Under a will an undivided share of real estate stood limited in remainder after certain life estates and estates tail to the right heirs of *A.* In a partition suit to which *A.* was a party, a decree for sale was made under the *Partition Act*, 1868:—*Held*, that the interests of the persons or person who on the death of *A.* would become the right heirs or right heir of *A.* were bound in equity by the decree:—*Held*, also, that such persons were "unborn" persons within the meaning of the *Trustee Act*, 1850, s. 30. Bassnett *v.* Moxon - - - - 182

3. —— *Sale — Partition Act*, 1868 (31 & 32 *Vict. c.* 40), *ss.* 3, 4, 5—*Undertaking to purchase by Married Woman.*] The 3rd and 4th sections of the *Partition Act*, 1868, are not controlled in their operation by the 5th section of that Act.—The undertaking to purchase mentioned in the 5th section of the Act cannot be given by a married woman whose husband does not join therein.—Property consisting of a farmhouse and buildings and thirty acres of land was divisible into thirty-six shares; fifteen of them were vested in eight persons who desired a sale, six of them being entitled to one thirty-sixth share each; the remaining twenty-one were vested in a married woman living apart from her husband. The married woman was in occupation of the farm and opposed a sale, and was willing to give an undertaking to purchase the fifteen shares, but her husband did not join therein. There was evidence that the property would sell advantageously for other than agricultural purposes:—*Held*, that the owners of the fifteen shares were entitled to a sale under the 5th section of the *Partition Act*, 1868, because the owner of the remaining shares could not give a valid undertaking to purchase their shares:—*Held*, also, that a sale ought to be directed under the 3rd section, on account of the nature of the property and the number of the parties interested, and because in the opinion

**PARTITION SUIT**—*continued.*
of the Court a sale would be more beneficial for the parties interested than a division among them. Drinkwater *v.* Ratcliffe - - - 528

4. —— *Sale—Order at Hearing — Partition Act*, 1868 (31 *&* 32 *Vict. c.* 40), *s.* 9.] An order for sale of real estate under the *Partition Act*, 1868, cannot be made at the hearing, unless all persons interested in the property are parties to the cause. Mildmay *v.* Quicke - - 537

**PARTNERSHIP**—Agreement to share profits 331
*See* Perception of Partnership Profits.

—— Agreement as to payment of share of deceased partner - - - 564
*See* Joint and Several Liability. 1.

—— Assets—Value of mill - - - 25
*See* Partnership Assets.

—— Dissolution—Payment of part of debt by consenting partner - - - 721
*See* Limitations, Statute of. 2.

—— Dissolution — Purchase of assets by one partner—Order and disposition - 387
*See* Order and Disposition.

**PARTNERSHIP ASSETS**— *Profits—Capital—Rise in Value of Mill and fixed Plant.*] On the formation of a partnership it was agreed that the business should be carried on at a mill belonging to *R.*, one of the partners; and *R.* was credited in the books of the partnership with the value of the mill. From time to time sums were expended in making additions to and improvements in the mill; and in the yearly balance-sheets the mill was entered at the original value, increased by the amount so expended, but less a certain amount for depreciation; and the partners were allowed interest on the sums from time to time standing to their capital accounts:—*Held*, that in the absence of any special agreement the mill was an asset of the partnership, and that on a sale of the business, under which the purchase-money of the mill was largely in excess of its value in the books, the difference was profit divisible in the proportions in which the profits of the business were divisible at the time of the sale. Robinson *v.* Ashton. Ashton *v.* Robinson - - - - 25

**PATENT**—Disclaimer—Taking off the file 346
*See* Taking off the File.

**PATENT SUIT**—*Actual User—Infringement—Interim Injunction.*] An interim injunction will not be granted to restrain infringement of a patent several years old but never established by legal proceedings, unless there has been actual user of the patent for a considerable time. Plympton *v.* Malcolmson - - - - 37

—— Costs—Models—Scientific witnesses 632
*See* Taxation of Costs. 4.

**PAYMENT**—Dividends on preference shares 556
*See* Payment of Dividends.

—— Into Court—Trustees Relief Act—Costs 561
*See* Trustees Relief Act.

—— Out of Court—Petition service—Costs 48
*See* Costs under Lands Clauses Act. 1.

—— Out of Court—Settled Estates Act—Tenant in tail - - - - 372
*See* Payment out of Court.

**PAYMENT OF DIVIDENDS**—*Company—Preferential Dividend—Payment of Arrears out of subsequent Profits.*] The directors of a limited company, under the authority of the articles of association, and with the sanction of a general meeting, issued preference capital carrying a dividend at £10 per cent. per annum, payable half-yearly:—*Held*, on demurrer, that, if the profits of any year were insufficient to pay the dividend in full to the preference shareholders, the deficiency might be made good out of subsequent profits. Webb *v.* Earle - - - 556

**PAYMENT OUT OF COURT** — *Practice—Leases and Sales of Settled Estates Act—Tenant in Tail—Disentailing Deed unnecessary.*] No disentailing deed is required on payment out of Court under the *Leases and Sales of Settled Estates Act* of a fund to a party who would have been in the position of a tenant in tail of the land represented by the fund. *In re* Wood's Settled Estates - 372

**PER CAPITA AND PER STIRPES**—Direction to distribute as the law directs - 410
*See* Distributions, Statute of.

**PERCEPTION OF PARTNERSHIP PROFITS**— *Principal and Agent — Partnership — Underwriting Business — Agreement to share Profits.*] An agreement dated in August, 1864 (previously to the passing of the Act 28 & 29 Vict. c. 86), provided that an underwriting account at *Lloyd's* should be carried on in the name of the Defendant, and the subscription paid in his name; that all policies, losses, and averages should be signed and settled by the Defendant, or by the Plaintiff as his agent; that the Plaintiff should apply the whole or such part of his time and attention to the said business as might be required for conducting the same; that proper books of accounts should be kept by the Plaintiff, he obtaining such assistance from time to time as he might find necessary, subject to the approval of the Defendant; that the Plaintiff should be paid or allowed a salary of £150 by the Defendant; that the profits should be divided between the Plaintiff and the Defendant in the following proportions, viz., that the Defendant should be entitled to four-fifths and the Plaintiff to one-fifth; that if in any one year the business should not yield any profit, but a loss should accrue to the Defendant, then he alone should bear and pay the said loss, and the Plaintiff should be entirely exempt from bearing or paying any part or proportion thereof, and any profit arising from the business of any one year should not be set off against or reduced by the loss in any other year; and that if after the division of profits in any one year any unexpected claim or demand should be made upon the partners, they should advance and pay their respective proportions thereof, nevertheless so that the Plaintiff be not called upon to pay any greater sum of money in respect of the business of any one year than the amount of the sum he should then have received as and for his share of the profits in respect of the business for that same year:—*Held*, that the contract was one of hiring and service, and not of partnership. Ross *v.* Parkyns - - - - - 331

**PETITION**—Adjudication of bankruptcy 762, 782
*See* Petition for Adjudication. 1, 2.

—— Adjudication of bankruptcy—When not necessary - - - - 777
*See* Adjudication without Petition.

**PETITION**—*continued.*

—— Lands Clauses Act—Costs - 48, 470
*See* Costs under Lands Clauses Act. 1, 3.

—— Liquidation—Service of, before discharge
*See* Undischarged Debtor. [743

**PETITION FOR ADJUDICATION** — *Petitioning Creditor's Debt — Equitable Assignee of Debt—Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *s.* 6.] The equitable assignee of a debt can present a bankruptcy petition against the debtor without joining the assignor as a co-petitioner. *Ex parte* Cooper. *In re* Baillie - - - 762

2. —— *Petitioning Creditor's Debt — Non-Trader—Debt contracted after the passing, but before the coming into operation, of the Bankruptcy Act*, 1861—*Covenant to repay a specific Sum, and further Advances—Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *s.* 118—*Bankruptcy Act*, 1861 (24 & 25 *Vict. c.* 134), *ss.* 90, 232—*Bankruptcy Repeal Act*, 1869 (32 & 33 *Vict. c.* 83), *s.* 20.] A non-trader cannot be adjudicated a bankrupt in respect of a debt contracted before the day on which the *Bankruptcy Act*, 1861, came into operation.—By a mortgage deed the mortgagor covenanted to pay the original mortgage debt and any further sums which might be advanced to him by the mortgagee:—*Held*, that, for the purpose of the presentation of a bankruptcy petition against the mortgagor, the obligation to repay the further advances constituted a debt contracted at the date of the mortgage deed. *Ex parte* Rashleigh. *In re* Dalzell - - - - - 782

**PETITIONING CREDITOR**—Bankruptcy 762, 782
*See* Petition for Adjudication. 1, 2.

**PLACES OF WORSHIP SITES ACT, 1873** (36 & 37 *Vict. c.* 50), *s.* 1—*Settled Estate—Grant by Tenant for Life—Infant Remainderman—Concurrence of Guardian—Jurisdiction.*] Where the concurrence of a guardian for an infant remainderman is required to a grant of land by a tenant for life in possession as a site for a church, under 36 & 37 Vict. c. 50, s. 1, the guardian by nature of such infant is not the proper person to concur.—In such a case the Court has no jurisdiction to appoint a guardian. *In re* Marquis of Salisbury [527

**PLANT**—Partnership—Rise in value - 25
*See* Partnership Assets.

**PLEADING** — Bill by individual shareholder against company - - 383, 474
*See* Suit by Shareholder. 1, 2.

—— Foreign state made Defendants - 140
*See* Foreign State.

**POLLUTION OF STREAM** — *Injunction—Metropolis Management Amendment Act*, 1862 (25 & 26 *Vict. c.* 102), *s.* 106—*Notice of Proceeding.*] The provisions of 25 & 26 Vict. c. 102, s. 106, requiring one month's notice to be served before instituting any proceeding against the Metropolitan Board of Works or any district board in respect of anything done or intended to be done under their Parliamentary powers, do not affect the right of a riparian owner, whose stream is being polluted by the drainage works of a district board, to summary relief by injunction.—The authority over sewers, and the drainage powers given by Parliament to local boards, do not authorize the committal of a nuisance by the boards in their exercise of such powers. Attorney-General *v.* Hackney Local Board - - - 626

**POLLUTION OF STREAM**—*continued.*

**PORTION**—Statute of Distributions—Advancement - - - - 155
*See* Advancement. 1.

**POSSESSION**—Adverse—Defective assurance—Statute of Limitations - - 692
*See* Limitations, Statute of. 1.

—— Receiver—Bankruptcy—Disturbance 282
*See* Receiver. 1.

—— Settled Estates Act—Separate use - 297
*See* Settled Estates Act.

—— Under order of the Court - - 887
*See* Order and Disposition.

**POWER**—Appointment under two special powers [599
*See* Appointment under Special Powers.

—— Sale—Charge of debts if personalty insufficient - - - - 348
*See* Charge of Debts.

**PRACTICE**—Appeal in winding-up - 637
*See* Appeal in Winding-up.

—— Bankruptcy—Appeal - - - 143
*See* Bankruptcy Appeal.

—— Bankruptcy—Costs in liquidation - 780
*See* Costs in Liquidation.

—— Bankruptcy—New trial - - 763
*See* New Trial in Bankruptcy.

—— Bill by foreign state—Cross bill—Discovery
*See* Foreign State. [140

—— Computation of time—Sunday - 289
*See* Contempt of Court.

—— Contempt of Court - - - 289
*See* Contempt of Court.

—— Costs of co-Defendants - - - 459
*See* Costs of co-Defendants.

—— Costs—Third counsel—Skilled witness 650
*See* Taxation of Costs. 5.

—— Costs under Lands Clauses Act 48, 369, [470, 605
*See* Costs under Lands Clauses Act. 1—4.

—— Mandatory order—Valuation - - 511
*See* Mandatory Order.

—— Partition suit - - 20, 182, 528, 537
*See* Partition Suit. 1—4.

—— Patent—Taking off the file - - 346
*See* Taking off the File.

—— Payment out of Court to tenant in tail 372
*See* Payment out of Court.

—— Public Worship Sites Act—Concurrence of guardian - - - - 527
*See* Public Worship Sites Act.

—— Settled Estates Act - - - 297
*See* Settled Estates Act.

—— Submission to arbitration—Lands Clauses Act - - - - - 33
*See* Submission to Arbitration.

—— Taxation of costs 17, 449, 452, 632, 650
*See* Taxation of Costs. 1—5.

—— Trustee Relief Act—Costs - - 561
*See* Trustee Relief Act.

—— Vendor and Purchaser Act - - 179
*See* Wife's Chose in Action. 1.

**PRACTICE**—*continued.*
—— Wife suing as *feme sole* - - 454
*See* Wife's Chose in Action. 2.

**PREFERENCE SHARES**—Payment of dividends —Subsequent profits - - 556
*See* Payment of Dividends.

**PREFERENCE SHAREHOLDERS**—Surplus assets —Priority - - - - 59
*See* Distribution of Surplus Assets.

**PRESSURE**—Fraudulent preference - 763
*See* Fraudulent Preference. 3.

**PRESUMPTION OF DEATH**—*Tenant for Life—Mortgage—Evidence of Death or Life—Person not heard of for Seven Years—Onus Probandi.*] A tenant for life entitled beneficially under a will assigned her interests to secure the repayment of certain advances, and the premiums on policies on her life. At the end of March, 1866, a small sum of money—usually paid quarterly—was paid to her. Shortly afterwards she went on a pedestrian tour, and had never been heard of since. The small sum which became payable at the end of June was never applied for:—*Held*, that the presumption was that she was dead; that on the evidence she could not be presumed to have died before June, 1866; but that she must be taken to have died soon after June, 1866. Hickman *v.* Upsall - - 136

**PRIORITY**—Liquidation by arrangement—Distribution of assets—Costs - - 780
*See* Costs in Liquidation.

—— Notice—Fraud of solicitor - - 238
*See* Purchase for Value without Notice.

—— Preference shareholders—Surplus assets 59
*See* Distribution of Surplus Assets.

**PRIVATE INJURY**—Allegation of - 127
*See* Nuisance by Public Body.

**PROFITS**—Agreement to share—Partnership 331
*See* Perception of Partnership Profits.

—— Partnership—Rise in value of plant - 25
*See* Partnership Assets.

**PROHIBITION**—*Want of Jurisdiction—Prohibition at instance of Defendant—Mayor's Court of London Procedure Act*, 1857 (20 & 21 *Vict.* c. clvii), *s.* 15.] The Defendant in an action in the Lord Mayor's Court may obtain a writ of prohibition, notwithstanding the 15th section of the *Mayor's Court of London Procedure Act*, 1857, which enacts that "no defendant shall be permitted to object to the jurisdiction of the Court in or by any proceeding whatsoever except by plea;" the real effect of that section being only to limit the modes of objecting within the Lord Mayor's Court to the jurisdiction.—*Manning* v. *Farquharson* (30 L. J. (Q.B.) 22) not followed. Jacobs *v.* Brett - 1

2. —— *Mayor's Court—Jurisdiction—Discretion of Superior Court.*] When a writ of prohibition has been issued to restrain proceedings in the Mayor's Court on the application of a stranger to the suit, it cannot be sustained unless he can shew that the Court has exceeded its jurisdiction both with reference to the facts and the law, and then it is a matter of discretion with the superior Court whether or not to set it aside.—*Worthington* v. *Jefferies* (Law Rep. 10 C. P. 379) not followed. Chambers *v.* Green - - - - 552

**PROMOTER OF COMPANY**—Agreement with—Paid-up shares - - - 580
*See* Fiduciary Relation.

—— Agreement to indemnify against costs 620
*See* Agreement to indemnify.

**PROMOTER** — Company — Misrepresentation — Prospectus - - - - 114
*See* Misrepresentation in Prospectus.

**PROOF** — Bankruptcy — Joint and separate estates - - - - 767
*See* Joint and Separate Estates.

—— Bankruptcy—Secured creditor - 273
*See* Creditor holding Security.

**PROSPECTUS**—Misrepresentation - - 114
*See* Misrepresentation in Prospectus.

**PROTECTION ORDER**—Married woman - 454
*See* Wife's Chose in Action. 1, 2.

**PROTECTOR OF SETTLEMENT**—*Estate Tail—Disentailing Assurance—Two or more Owners of prior Estate—Undivided Shares—Fines and Recoveries Act* (3 & 4 *Will.* 4, *c.* 74), *s.* 23.] Freeholds stood limited to *A.*, *B.*, *C.*, and *D.* jointly for life, remainder in fifths to them and *E.* as tenants in common in tail male, with cross remainders in tail male.—*A.*, without the consent of *B.*, *C.*, or *D.*, and in the lifetime of *E.*, who afterwards died without issue, executed a disentailing deed of his estates tail:—*Held*, that *A.* was protector not merely of an aliquot share of the estate, but specifically of his original fifth share, and also of the fourth of *E.'s* fifth in remainder after *E.'s* estate tail; and consequently that the original fifth share of *A.*, and also his fourth of *E.'s* fifth share, were effectually disentailed. Tufnell *v.* Borrell - - - - - 194

**PUBLIC NUISANCE**—Board of health - 127
*See* Nuisance by Public Body.

**PURCHASE FOR VALUE WITHOUT NOTICE**—*Solicitor — Fraud — Priority.*] *W.*, the acting trustees of a marriage settlement, duly advanced £2000, part of the trust funds, upon mortgage of real estate, of which he took a conveyance to himself and his co-trustee, and obtained possession of the title-deeds. *C.*, the mortgagor, was a client of *W.*, who was a solicitor. Afterwards *W.* fraudulently handed over all the deeds to *C.* *C.* suppressed the mortgage deeds, and deposited the rest, in March, 1865, with a bank to secure his current account. The manager of the bank requiring a certificate of title, *C.* referred him to *W.*, who signed a certificate, in the manager's handwriting, at the foot of the memorandum of deposit: "I hereby certify that Mr. *C.* has a good title to the above properties," for which the bank paid him a fee. In 1868 *W.* became bankrupt, whereupon the fact of the deposit with the bank was discovered by the co-trustee and the beneficiaries; and the bank were informed of the trustees' claim. In 1869 *C.* died, and the mortgage deeds could not be found. In 1873 *W.* died.—On bill by the beneficiaries and surviving trustee of the settlement against the bank, praying for a declaration that the Plaintiffs were first mortgagees, and for delivery up of the title-deeds:—*Held*, that by reason of the fraud of *W.* notice of the first mortgage could not be imputed through him to the bank, and that the bank were mortgagees for value without notice of the prior mortgage.—

**PURCHASE FOR VALUE WITHOUT NOTICE**—*continued.*
Decree against the bank for foreclosure simply, following *Heath* v. *Crealock* (Law Rep. 10 Ch. 22), without any order for delivery up of the title-deeds.—Secondary evidence of the missing deeds having been duly made and executed, admitted, and found sufficient. Waldy v. Gray - 238

**PURCHASE-MONEY**—Lands Clauses Act—Re-investment—Costs - - - - 605
*See* Costs under Lands Clauses Act. 4.

**QUALIFICATION**—Charity—Parishioners - 606
*See* Election to Christ's Hospital.

**RAILWAY**—Abandonment—Return of deposit
*See* Abandonment of Railway. [197

**RAILWAY COMPANY**—Nuisance by—Necessary works - - - - - 544
*See* Nuisance by Railway Company.

**RECEIVER**—*Disturbance of Possession—Contempt—Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *ss.* 12, 13, 20, 34—*Bankruptcy Rules*, 1870, *rr.* 260, 299.] Where a receiver of a bankrupt's property has been appointed by the Court of Bankruptcy, it is a contempt of Court for the holder of a valid bill of sale of goods of the bankrupt to oust the receiver from possession which he has taken of such goods.—The only person who may interfere with the possession of a receiver is a landlord distraining for a year's rent.—Any other person who claims a better title than the receiver ought to apply to the Court of Bankruptcy for leave to enforce his rights.—*Ex parte Till* (Law Rep. 16 Eq. 97) explained. *Ex parte* Cochrane. *In re* Mead - - - - - - 282

2. —— *Liquidation—Receiver and Manager—Investigation of Debtor's Affairs—Valuation of Debtor's Assets—Costs—Employment of Debtor to assist in Management of Business—Remuneration—Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *ss.* 26, 38—*Bankruptcy Rules*, 1873, *rr.* 260, 261, 262.] A receiver and manager of the property and business of traders who had filed a liquidation petition was appointed by the Court under Rule 260. Without obtaining any previous sanction from the Court or the creditors, he expended a considerable sum in obtaining a valuation of the debtor's assets, and he also employed the debtors to assist in managing the business at a weekly salary:—*Held*, that the Court had a discretion as to allowing the sums so expended, and that under the circumstances they had been properly allowed:—*Held*, also, that the sanction of the Court to the expenditure could be given after it had been made.—It is the duty of a receiver, whether appointed by the Court or nominated by the creditors, to investigate the state of the debtor's affairs, and inform the creditors at their first meeting what he believes to be the value of the debtor's assets. *Ex parte* Gordon. *In re* Gomersall - - - - - - 291

3. —— *Contract to purchase a Mine—Suit to rescind Contract—Appointment of Receiver and Manager.*] In a suit by the purchaser of a coal mine to rescind the contract on the ground of fraudulent misrepresentations, it being essential that the mine should be kept in a going state, the

**RECEIVER**—*continued.*
Court, upon the application of the purchaser, who was in possession of the colliery, appointed a receiver and manager until the hearing. Gibbs *v.* David - - - - - - 373

—— Costs of—Liquidation - - - - 780
*See* Costs in Liquidation.

**RECTIFICATION OF SETTLEMENT**—*Ward of Court—Settlement of Personal Estate—Limitation on Death of Husband and in default of Children to Next of Kin of surviving Wife—Rectification by giving the Property to Wife absolutely.*] By a marriage settlement executed in pursuance of articles made under the order of the Court on the marriage of a lady, an infant and a ward of Court, personalty of the wife was limited on death of the husband and in default of children, both which events happened, to the wife, as she should by will appoint, and in default to her next of kin.—Upon her uncontradicted evidence that this was not in accordance with her intention:—*Held*, that she was entitled to have the settlement rectified by limiting the property, in the events which had happened, to herself, her executors and administrators, absolutely; and declaration to that effect ordered to be indorsed on the settlement. Smith *v.* Iliffe - - - - - - 666

2. —— *Settlement in pursuance of Articles—Limitation in default of Children—Ultimate Trust of Wife's Property to Wife—Arrears of Income due at Death of Husband—Reduction into Possession.*] A lady, possessed of about £12,000 consols, being engaged to be married, a draft settlement in the usual form was submitted to the intended husband, who objected to some of its provisions, and insisted that if there should be "no children," and he should survive his wife, the fund should belong to him. Articles embodying this provision were hastily signed before the marriage; and after the marriage, the fund having been transferred to the trustees, a draft settlement, in execution of the articles, was prepared, but objected to by the husband, and, as ultimately executed, contained limitations to the husband and wife and the survivor for their lives, and as to the capital to the children of the marriage absolutely, not to such as should attain twenty-one or marry, and without any limitation over, in the event of the death of a son or of an unmarried daughter under twenty-one. There was also a provision that "if there should be no child" of the husband and wife, and the husband should survive the wife, the fund should belong to him; but the deed contained no alternative limitation in the events of there being no child, and of the wife surviving the husband. The husband brought no property into settlement.—In the event, one child was born, but died an infant in the lifetime of both parents. The husband died; and his representative claiming the fund, subject to the widow's life interest—upon bill by the widow for rectification of the settlement, and for a declaration that she was entitled to the fund:—*Held*, that the transfer of the fund to the trustees was not a reduction into possession by the husband:—*Held*, also, that the settlement was not in accordance with the articles, and that it ought to be rectified; and that, in the events which had happened, the Plaintiff was entitled to the fund:—*Held*, also, that the

**RECTIFICATION OF SETTLEMENT**—*continued.*
Plaintiff was entitled to arrears of income due at the death of the husband. Cogan *v.* Duffield - - - - - - 789

**REDDENDO SINGULA SINGULIS** — General words - - - - 599
*See* Appointment under Special Powers.

**REDUCTION INTO POSSESSION**—Wife's *chose in action* - - - - 179
*See* Wife's Chose in Action. 1.

—— Wife's property—Assignment to trustees 789
*See* Rectification of Settlement. 2.

**REGISTRATION**—Bill of sale—Renewed bill 786
*See* Assignment of all Debtor's Property.

—— Resolution for composition - - 742
*See* Resolution for Composition.

—— Resolution for liquidation - - 775
*See* Resolution for Liquidation.

**REINVESTMENT** — Purchase-money — Lands Clauses Act - - - 369, 605
*See* Costs under Lands Clauses Act. 2—4.

**RELATIVES** — Distribution among, "as the law directs" - - - - 410
*See* Distributions, Statute of.

**RELEASE OF CHARGE**—Mistake in settlement
*See* Setting aside Settlement. [698

**REMUNERATION** — Receiver and manager—Liquidation - - - - 291
*See* Receiver. 2.

**RESCISSION OF CONTRACT**—Contract to purchase mine—Appointment of manager and receiver - - - - 373
*See* Receiver. 3.

**RESIDUARY LEGATEE**—Debt due from—Set-off
*See* Set-off in Equity. 1. [29

**RESOLUTION FOR COMPOSITION**—*Composition—Validity—Small amount of Assets—Registration of Resolutions—Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *s.* 126—*Bankruptcy Rules*, 1870, *r.* 295.] A debtor filed a liquidation petition, and the creditors unanimously resolved to accept a composition of 3*d.* in the pound. The debts were £130; the assets amounted to £7. The Registrar refused to register the resolutions, though no creditor opposed, on the ground that there were "no available assets for distribution among the creditors."—*Held*, that, as all the requirements of the *Bankruptcy Act* and the Rules had been complied with, the resolutions must be registered. *Ex parte* Elworthy. *In re* Elworthy - 742

**RESOLUTION FOR LIQUIDATION**—*Registration of Resolutions—Small amount of Assets—Abuse of Procedure of Court—Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *s.* 125—*Bankruptcy Rules*, 1870, *r.* 295.] The statement of a debtor who had filed a liquidation petition shewed that his debts amounted to £540, and that his assets were only £32. The creditors resolved upon a liquidation. One creditor opposed the registration of the resolutions:—*Held*, that the petition was an abuse of the procedure of the Court, and that the registration had been rightly refused. *Ex parte* Staff. *In re* Staff - - - - - 775

**RESTRAINING ULTRÀ VIRES ACT** — Suit by shareholder - - - 383, 474
*See* Suit by Shareholder. 1, 2.

**RESTRAINT ON ALIENATION**—*Will—Devise on Condition never to sell out of Family — Vendor and Purchaser—Title*—25 & 26 *Vict. c.* 53, *s.* 6.] Devise "to my brother *J.* on the condition that he never sells out of the family," followed by gifts to other relatives:—*Held*, that the condition was valid:—*Held*, also (on an application under 25 & 26 Vict. c. 53, s. 6), that *J.* could not give a marketable title to a purchaser who was a stranger to the family.—*Attwater* v. *Attwater* (18 Beav. 330) distinguished. *In re* Macleay - - 186

**RESULTING TRUST**—Advancement - 328
*See* Advancement. 2.

**REVERSIONER**—Nuisance—Right to use 22
*See* Temporary Nuisance. 1.

**REVOCATION OF GIFT** — *Old Will—Devise by Mortgagee of Mortgage and Trust Estates—Subsequent Contract by Testator for Purchase of the Equity of Redemption — Revocation of Devise—Descent—Claim of Heir barred by lapse of Time—Statute of Limitations* (3 & 4 *Will.* 4, *c.* 27), *ss.* 2, 17, 25.] *T. W.*, in 1824, became mortgagee in fee of *Blackacre*. The form of the conveyance was to him on trust to sell, and out of the proceeds to retain the debt, and pay the surplus, if any, to the mortgagor. In February, 1826, *T. W.* made his will, whereby he devised all his real estate (except mortgage and trust estates) and all his personal estate to trustees, upon trust for *Y.* and *H.* He also devised to the same trustees all his mortgage estates upon trust, on payment of the moneys due, to convey the same to the person who should be entitled to the equity of redemption; and directed the moneys to form part of his personal estate. In March, 1826, the mortgagor of *Blackacre* became bankrupt; and in June, 1826, *T. W.* contracted with the assignees in bankruptcy for the purchase of the equity of redemption. The purchase-money was paid by *T. W.*, but no conveyance from the assignees was ever executed. In October, 1826, *T. W.* died, leaving *Y.* and *C.* his co-heirs. *C.* by deed renounced to the trustees of the will all claim under the contract of June, 1826. The trustees under the will entered into receipt of the rents of *Blackacre*, and administered the same as part of the testator's estate until 1869.—*Y.* then claimed the right to a conveyance of one moiety of *Blackacre* as co-heir of *T. W.*:—*Held*, that the purchase of the equity of redemption by the testator revoked the devise by his will, not only of the beneficial interest but of the legal estate in the mortgaged property; that no dry legal estate in *Blackacre* was remaining in the trustees of the will at the testator's death; that the mortgage estate had by the contract ceased to be a mortgage, and had become a new absolute interest; and that *Blackacre* was undisposed of by the will:—*Held*, further, that the claim of *Y.*, as co-heir, against the trustees had become barred by the *Statute of Limitations*. Yardley *v.* Holland - 428

**SALE**—Agent—Company - - - 412
*See* Contract by Agent.

—— By Court—Opening biddings - - 77
*See* Auction.

**SALE**—*continued.*
—— By Court—Possession—Order and disposition *See* Order and Disposition. [387
—— Partition suit - - 20, 182, 528, 537 *See* Partition Suit. 1—4.
—— Statute of Frauds - - - 11 *See* Frauds, Statute of.
**SCALE OF COSTS**—Chancery or Parliamentary 17 *See* Taxation of Costs. 1.
**SCHOOL**—Election of children—Qualification—Parishioner - - - - 606 *See* Election to Christ's Hospital.
**SECRET TRUST**—Trust for parish - - 483 *See* Trust for Parish.
**SECRETARY OF COMPANY**—Agent for selling property - - - - 412 *See* Contract by Agent.
**SECURED CREDITOR**—Bankruptcy—Proof 273 *See* Creditor holding Security.
**SECURITY**—Joint and separate estates—Separate debt - - - - - - 767 *See* Joint and Separate Estates.
—— On eve of bankruptcy—Validity—Preference *See* Fraudulent Preference. 2. [746
—— Valuation of - - - - 273 *See* Creditor holding Security.
**SEPARATE ESTATE** - - - - 767 *See* Joint and Separate Estates.
**SEPARATE ESTATE OF WIFE**—*Trustee—Liability for Breach of Trust—Gift of Fund to be applied at Discretion of Trustee for Benefit of Another—Liability to Account.*] The separate estate of a married woman is not in general liable for breaches of trust or torts committed by her. —Where an annuity was given to *A.* in trust to apply the same at his discretion for the benefit of *B.* during his life, and for his advancement, maintenance, support, or otherwise for his benefit, without being answerable for any of the moneys so laid out, or the exercise of the discretion so vested in the said trustee as to the mode and extent of expending and laying out the same:—*Held*, that *A.* could not apply any portion of the annuity for his own benefit, but was bound to account for all sums not shewn to be applied for the advancement, maintenance, support, or benefit of *B.* Wainford *v.* Heyl. - - - - - - 321
**SEPARATE USE**—Possession or receipt of rents—Settled Estates Act - - 297 *See* Settled Estates Act.
**SEPARATION**—Protection order—Wife suing as *feme sole* - - - - 454 *See* Wife's Chose in Action. 2.
**SEQUESTRATION**—Arrest of ship - - 325 *See* Injunction in Winding-up.
**SERVICE OUT OF JURISDICTION**—Notice of motion—No order authorizing - 733 *See* Bankruptcy Jurisdiction. 1.
**SERVICE**—Petition under Lands Clauses Act—Costs - - - - 48, 470 *See* Costs under Lands Clauses Act. 1—3.
**SET-OFF**—Debt due to administrator - 155 *See* Advancement. 1.
**SET-OFF IN EQUITY**—*Debts—"En autre Droit"—Debts due to and from Executor and Residuary Legatee—Assignment after Decree.*] *N.* and *C.* were executors of a will and trustees of the residuary real and personal estate of a testator who died in 1859. *N.* and *F.* were tenants for life of the residuary estate in equal shares. In January, 1873, *C.* was residing abroad, and *N.*, being about also to go abroad, gave to *P.* (the solicitor of the executors and trustees) an authority on behalf of both trustees to receive the rents of the real estate and pay the outgoings. Under this authority *P.* received the rents; and at his death a considerable sum was due from him in respect thereof.—*P.'s* estate proved insolvent, and the usual creditor's decree was made for administration. Subsequently to the decree *F.* assigned to *N.* all *F.'s* interest in the sum due from *P.* *N.* was indebted to *A.* and *B.* as trustees for *P.* in a sum the repayment of which was secured by a mortgage of real estate belonging to *N.*: and this sum was paid into Court in the suit to a separate account, under an order made without prejudice to any question as to set-off. *N.* afterwards presented a Petition claiming to be entitled to set off the debt due from *P.* against the mortgage debt, and seeking to have the amount of the debt due from *P.* paid out of the fund standing to the separate account:—*Held*, that as regards *F.'s* interest there could be no set-off, inasmuch as it was not assigned to *N.* until after the decree:—*Held*, also, that the debt due from *P.* being either due to both trustees and executors, or if due to *N.* alone, due to him in his character of trustee and executor, could not be set off against a debt due from him individually.—*Dicta* in *Cochrane* v. *Green* (9 C. B. (N.S.) 448; 30 L. J. (C.P.) 97) disapproved of. Middleton *v.* Pollock. *Ex parte* Nugee - - - 29

2. —— *Debt to Joint Creditors contracted by Fraud—Separate Debt due from one of Joint Creditors.*] There is no rule that a debt due to joint creditors, which has been contracted by fraud, can be set off against a separate debt due from one of the joint creditors.—*Ex parte Stephens* (11 Ves. 24) and *Vulliamy* v. *Noble* (3 Mer. 593) explained.—*P.*, the solicitor of *K.* and *R.* (who were trustees of a marriage settlement), received on their behalf the sum of £4000, and represented that he had invested the whole of it on mortgage. He did invest on mortgage two sums of £2200 and £850, part thereof; but he never invested the balance of £950. The debt of £2200 was (with the knowledge of *K.* and *R.*) paid off and received by *P.*, and retained by him for reinvestment; but no reinvestment was ever made. *P.* died insolvent:—*Held*, that neither of the sums of £2200 and £950 due from his estate could be set off against a separate debt due to the estate from *K.* Middleton *v.* Pollock. *Ex parte* Knight and Raymond 515

3. —— *Debt barred by Statute of Limitations—Share under Intestacy.*] An administrator is entitled to set off against the share of one of the next of kin in the intestate's estate, the whole of a debt of which part had become barred by the *Statute of Limitations*. *In re* Cordwell's Estate. White *v.* Cordwell - - - - 644

**SETTING ASIDE SETTLEMENT**—*Family Settlement—Setting aside—Consideration—Release of Charge—Mistake.*] A family settlement will not

**SETTING ASIDE SETTLEMENT**—*continued.*
be supported if founded on a mistake of either party to which the other party is accessory, although such mistake may have been innocently made.—A son, tenant in tail in remainder, shortly after attaining twenty-one joined with his father, the tenant for life, in re-settling the family estates. The son was influenced to make the re-settlement by the representation of his father that a portions' charge of £5000 was not (as in fact it was) a subsisting charge on the estates, but was a charge to take effect only in case the father should so direct, and a release of the supposed power to charge contained in the re-settlement was the principal consideration for its execution:—*Held*, that, although this misrepresentation was innocently made, the re-settlement must be set aside as founded on mistake. Fane *v.* Fane - 698

**SETTLED ESTATES ACT**—*Will—Settled Estate—Trustees—Tenant for Life—Possession*—19 & 20 *Vict. c.* 120, *s.* 32.] A testator, after devising two-fifths of certain real estate to which he was entitled to trustees upon trust to receive the net rents and pay them to *M.* for life for her separate use, devised his residuary real and personal estate to the same trustees upon trust to receive the annual and other rents, interest, and income of his said real and personal estate, and after defraying thereout all ground and landlord's rent (if any), and all taxes, charges, and expenses of insurance, repairs, collection, and other necessary outlay, to pay the net annual rents, interest, and income, then left to *M.* for life for her separate use. The will contained no power of leasing:—*Held*, that *M.* was not "entitled to possession or receipt of the rents and profits" of the testator's residuary real estate, within the meaning of sect. 32 of the *Leases and Sales of Settled Estates Act*, and consequently that *M.* was not entitled to grant leases thereof. Taylor *v.* Taylor. *Ex parte* Taylor - 297

—— Payment out of Court—Disentailing deed
*See* Payment out of Court. [372

**SETTLEMENT**—Covenant to settle—Property of husband - - - - 534
*See* Covenant to settle.

—— Protector—Disentailing deed - - - 194
*See* Protector of Settlement.

—— Rectification of - - - - 666, 789
*See* Rectification of Settlement. 1, 2.

—— Setting aside - - - - - 698
*See* Setting aside Settlement.

—— Tenant—Death of tenant for life leaving children - - - - - 711
*See* Death coupled with a Contingency. 2.

—— Voluntary—27 Eliz. c. 4 - - - 210
*See* Voluntary Settlement.

—— Wife's equity to - - - - - 644
*See* Equity to a Settlement.

**SHARES**—Issue at discount - - - 339
*See* Borrowing Powers.

—— Paid-up—Contract for - - - - 524
*See* Contract for paid-up Shares.

—— Paid-up out of money of company—Directors
*See* Fiduciary Relation. [580

**SHARES**—*continued.*
—— Preference—Payment of dividends - 556
*See* Payment of Dividends.

**SHAREHOLDERS**—Distribution of surplus assets
*See* Distribution of Surplus Assets. [59

—— Meeting of—Discretion as to calling—Directors - - - - - 669
*See* Interference with Management of Company.

—— Rights *inter se* - - - - - 585
*See* Adjustment of Shareholders' Rights.

—— Suit by—When sustainable - 383, 474
*See* Suit by Shareholder. 1, 2.

**SHIP**—Arrest of—Winding-up - - 325
*See* Injunction in Winding-up.

—— Builder—Mortgage of unfinished ship 746
*See* Fraudulent Preference. 2.

**SOLICITOR**—Costs—Liquidation by arrangement—Priority - - - - - 780
*See* Costs in Liquidation.

—— Debt to client—Express trust - 721
*See* Limitations, Statute of. 2.

—— Fraud—Purchase for value without notice [238
*See* Purchase for Value without Notice.

**SPECIFIC PERFORMANCE**—Agreement for lease
*See* Agreement for Lease. [659

—— Contract by agent - - - - 412
*See* Contract by Agent.

—— Fraudulent preference—Guarantee - 65
*See* Fraudulent Preference. 1.

—— Misleading conditions of sale - 50
*See* Conditions of Sale.

—— Order to permit valuation to be made 511
*See* Mandatory Order.

—— Substituted contract become impossible 100
*See* Substituted Contract.

—— Uncertain agreement—Reservation of "necessary land" - - - - 492
*See* Uncertain Agreement.

**STALL AT THEATRE** - - - - 145
*See* Box at Theatre.

**STATUTES**:—
27 Eliz. c. 4—*Fraudulent Conveyances* - 210
*See* Voluntary Settlement.
21 Jac. 1, c. 16—*Limitations* - - 721
*See* Limitations, Statute of. 2.
29 Car. 2, c. 3—*Statute of Frauds* - 11
*See* Frauds, Statute of.
22 & 23 Car. 2, c. 10, s. 5—*Distributions* 155
*See* Advancement. 1.
9 & 10 Will. 3, c. 15—*Arbitration* - 39
*See* Submission to Arbitration.
39 & 40 Geo. 3. c. 98—*Accumulations* - 255
*See* Accumulations.
3 & 4 Will. 4, c. 27, ss. 2, 17, 25—*Limitations*
*See* Revocation of Gift. [428
—— —— s. 23 - - - - - 692
*See* Limitations, Statute of. 1.
—— c. 42, s. 13 - - - - - 721
*See* Limitations, Statute of. 2.

STATUTES—*continued.*

1 Vict. c. 26, s. 24—*Wills* - - - 304
*See* Legacy, Specific or General.

1 & 2 Vict. c. 110, ss. 14, 15—*Judgments* 677
*See* Charging Order.

3 & 4 Vict. c. 74, s. 23—*Fines and Recoveries*
*See* Protector of Settlement. [194

8 Vict. c. 18, s. 68—*Lands Clauses Act* - 353
*See* Compensation under Railway Clearing House Act.

—— —— ss. 69, 70 - - - - 468
*See* Investment of Money in Court.

—— —— ss. 36, 68 - - - - 39
*See* Submission to Arbitration.

—— —— s. 80 - - - 48, 369, 470, 605
*See* Costs under Lands Clauses Act.

—— —— s. 104 - - - - - 403
*See* Compensation under Lands Clauses Act.

8 Vict. c. 20, ss. 16, 32—*Railway Clauses* 544
*See* Nuisance by Railway Company.

13 & 14 Vict. c. 60, s. 30—*Trustee Act* 20, 182
*See* Partition Suit. 1, 2.

13 & 14 Vict. c. 83—*Abandonment of Railways*
*See* Abandonment of Railways. [197

15 & 16 Vict. c. 83, s. 43—*Patents* - 632
*See* Taxation of Costs. 4.

16 Vict. c. 113, s. 20—*Limitations* - 721
*See* Limitations, Statute of. 2.

17 & 18 Vict. c. 36, s. 1—*Bills of Sale* - 786
*See* Assignment of all Debtor's Property.

17 & 18 Vict. c. 125, s. 17—*Common Law Procedure* - - - - 39
*See* Submission to Arbitration.

19 & 20 Vict. c. 120—*Settled Estates Act* 372
*See* Payment out of Court.

—— —— s. 32 - - - - - 297
*See* Settled Estates Act.

20 & 21 Vict. c. clvii. s. 15—*Lord Mayor's Court* - - - - - 1
*See* Prohibition. 1.

20 & 21 Vict. c. 85, ss. 21, 25, 26—*Divorce Court* - - - 179, 454
*See* Wife's Chose in Action. 1, 2.

21 & 22 Vict. c. 27—*Cairns' Act* - - 500
*See* Light and Air.

24 & 25 Vict. c. 134, ss. 90, 232—*Bankruptcy* 782
*See* Petition for Adjudication. 2.

25 & 26 Vict. c. 53, s. 6—*Land Transfer* 186
*See* Restraint on Alienation.

—— c. 89, s. 63—*Companies* - - 325
*See* Injunction in Winding-up.

—— —— s. 80 - - - - 268, 337
*See* Winding-up Petition. 1, 2.

—— —— ss. 87, 163 - - - - 162
*See* Leave to proceed after Winding-up.

—— —— s. 109 - - - - - 620
*See* Agreement to indemnify.

25 & 26 Vict. c. 102, s. 106—*Metropolis Management* - - - - - 626
*See* Pollution of Stream.

STATUTES—*continued.*

28 & 29 Vict. c. 86—*Partnership* - 331
*See* Perception of Partnership Profits.

30 & 31 Vict. c. 48—*Auctions* - - 77
*See* Auction.

30 & 31 Vict. c. 131, s. 25—*Companies* - 524
*See* Contract for paid-up Shares.

—— —— s. 38 - - - - - 114
*See* Misrepresentation in Prospectus.

31 & 32 Vict. c. 40, ss. 3, 4, 5—*Partition* 528
*See* Partition Suit. 3.

—— —— s. 7 - - - - 20, 182, 537
*See* Partition Suit. 1, 2, 4.

32 & 33 Vict. c. 71, s. 6—*Bankruptcy* - 762
*See* Petition for Adjudication. 1.

—— —— s. 6 - - - - - 786
*See* Assignment of all Debtor's Property.

—— —— ss. 12–38 - - - 282, 291
*See* Receiver.

—— —— ss. 16, 40 - - - - 273
*See* Creditor holding Security.

—— —— s. 23 - - - - - 682
*See* Disclaimer.

—— —— ss. 54, 125 - - - - 743
*See* Undischarged Debtor.

—— —— ss. 72–76 - - - - 733
*See* Bankruptcy Jurisdiction.

—— —— ss. 80, 102 - - - - 758
*See* Joint and Several Adjudications.

—— —— s. 92 - - - - 746, 763
*See* Fraudulent Preference. 1, 3.

—— —— s. 114 - - - - - 289
*See* Contempt of Court.

—— —— s. 118 - - - - - 782
*See* Petition for Adjudication. 2.

—— —— s. 104 - - - - - 767
*See* Joint and Separate Estates.

—— —— s. 125 - - - - - 775
*See* Resolution for Liquidation.

—— —— s. 125, sub-s. 12 - - - 777
*See* Adjudication without Petition.

—— —— s. 126 - - - - - 772
*See* Bankruptcy Jurisdiction. 2.

—— —— s. 126 - - - - - 742
*See* Resolution for Composition.

32 & 33 Vict. c. 83, s. 20—*Bankruptcy Repeal*
*See* Petition for Adjudication. 2. [782

32 & 33 Vict. c. 114—*Abandonment of Railways*
*See* Abandonment of Railway. [197

33 & 34 Vict. c. 78—*Tramways* - - 17
*See* Taxation of Costs. 1.

34 & 35 Vict. c. 36—*Pensions Commutation* 534
*See* Covenant to settle.

36 & 37 Vict. c. 50, s. 1—*Public Worship Sites*
*See* Public Worship Sites Act. [527

37 Vict. c. xvi.—*Railway Clearing House* 353
*See* Compensation under Railway Clearing House Act.

37 & 38 Vict. c. 62—*Infants* - - 677
*See* Charging Order.

37 & 38 Vict. c. 78, s. 9—*Vendor and Purchaser*
*See* Wife's Chose in Action. 1. [179

**STOCK**—Bequest of - - - - 304
*See* Legacy, Specific or General.

**STREAM**—Pollution of - - 626
*See* Pollution of Stream.

**STREET**—Common lands—Right of copyholders—Compensation under Lands Clauses Act - - - - - 403
*See* Compensation under Lands Clauses Act.

—— Improper use of—Obstruction of light 22
*See* Temporary Nuisance. 1.

**SUBMISSION TO ARBITRATION**—*Lands Clauses Consolidation Act*, 1845 (8 *Vict. c.* 18), *ss.* 36, 38—*Common Law Procedure Act*, 1854 (17 & 18 *Vict. c.* 125) *s.* 17—9 & 10 *Will.* 3, *c.* 15—*Setting aside Award—Time.*] *Semble*, a submission to arbitration under the *Lands Clauses Consolidation Act*, 1845, is not a "submission by consent" within the meaning of the *Common Law Procedure Act*, 1854, s. 17.—The conflict between *Ex parte Harper* (Law Rep. 18 Eq. 539) and *In re Newbold and Metropolitan Railway Company* (14 C. B. (N.S.) 405) and *Rhodes* v. *Airedale Drainage Commissioners* (Law Rep. 9 C. P. 508) explained.—Where a submission is made a rule of Court under sect. 36 of the *Lands Clauses Act*, the Court has the same jurisdiction in dealing with it as in the case of submissions under 9 & 10 Will. 3, c. 15, and any application to set it aside must be made within the time thereby limited.—Where an award had been made on a claim against a company in respect of lands alleged to be injuriously affected under an agreement for reference pursuant to sect. 68 of the *Lands Clauses Act*, the umpire having awarded that the company should pay a specified sum by way of compensation:—*Held*, that though in form the umpire had no power to order the company to pay, yet that such informality did not vitiate the award so far as it ascertained the amount of damages, assuming the company's liability. *In re* Harper and Great Eastern Railway Company - - 39

**SUBSTITUTED CONTRACT**—*Specific Performance—Impossibility of Performance—Death of Arbitrator—Decree for Performance of Original Contract—Damages—Interest.*] A landowner, through whose land a railway company proposed to pass, agreed in May, 1864, to withdraw his opposition to their bill on the terms that the company would vary the course of their line and make certain bridges, works, and approaches. The company gave a notice to treat, and on the 20th of March, 1867, they went into possession. On the 27th of May a further agreement was come to that the company should pay £2250 for purchase-money and compensation, and should construct the bridges askew according to an agreed plan.—The company constructed the line as agreed upon, but did not complete the works, nor pay the purchase-money, nor the interest, though completion of the works was demanded in July, 1868, and payment of interest in December, 1868.—On the 6th of February, 1869, a substituted agreement was made between the landowner and the company, whereby it was agreed that an estimate should be made by the company's engineer of the cost of completing the road, and submitted to *A.*, the landowner's agent, "for approval; in case of difference the amount to be determined by *B.*;" the amount, "when agreed or determined," to be paid to the landowner, "in discharge of all obligations" as to the road; and "the purchase to be completed forthwith."—In December, 1871, *A.* died; and in May, 1872, the company, for the first time, sent in an estimate for the cost of completing the road. The purchase had not been completed, and neither the purchase-money nor any interest had been paid. *B.* was living:—*Held*, that the submission of the estimate to *A.* for approval was of the essence of the agreement of the 6th of February, 1869; and that, inasmuch as by his death the agreement was incapable of being performed in the manner and form therein specified, the Court could not enforce performance of it.—Specific performance decreed of the works according to the agreements of 1864 and 1867.—The company were ordered to pay interest on the purchase-money from the date of their taking possession; but no inquiry was directed as to damages. Firth *v.* Midland Railway Company - - 100

**SUIT BY SHAREHOLDER**—*Practice—Company—Frame of Suit—Bill against Directors—Right of individual Shareholder to sue—Fraud—Ultrà vires—Constitution of Company—Authority of Chairman of Meeting.*] An individual shareholder in a company is entitled to file a bill against the directors on behalf of himself and all other shareholders except the Defendants, if he alleges that the directors, or some of them, have so acted as to prevent a majority of the members from exercising a proper control over the affairs of the company.—The articles of association of a company gave power to the chairman at any general meeting of the company, with the consent of the meeting, to adjourn the meeting, and also provided for the taking a poll if demanded by five shareholders. At a general meeting of the company the adjournment of the meeting was moved, and on being put was declared by the chairman, who was one of the directors, to be carried. A poll was duly demanded, but the chairman ruled that there could not be a poll on the question of adjournment, and left the chair. The shareholders who sided with the Plaintiff then passed a resolution, among others, removing one of the directors:—*Held*, on bill filed by a shareholder averring these facts, and charging that the directors, or some of them, had combined to take this course with the view of stifling discussion, that this made a case of improper conduct, bordering upon fraud, which entitled the Plaintiff to maintain his suit for restraining proceedings by the directors, which the Plaintiff and his party desired to prevent. MacDougall *v.* Gardiner [383

2. —— *Company—On behalf of Himself and other Shareholders—Illegal Payment by Directors—Ultrà vires—Form of Suit.*] Where a shareholder in an incorporated company filed his bill on behalf of himself and all other shareholders against the directors and the promoters of a bill in Parliament for a rival purpose, alleging an illegal payment of the company's money to such promoters to buy off their opposition, and praying that it might be replaced:—*Held*, on demurrer, that it was not sufficiently alleged in the bill that

**SUIT BY SHAREHOLDER**—*continued.*
the payment was *ultrà vires*:—*Held*, also, there being no allegation that the company would not sue, that it was not a case in which the suit could be maintained in its present form; and that the demurrer must be allowed, with leave to amend.—Observations on the exceptions to the general rule, that the company and not an individual corporator must sue when the trust funds of the company have been misapplied. Russell *v.* Wakefield Waterworks Company - 474

**SUNDAY**—Computation of time—Three days' notice - - - - 289
*See* Contempt of Court.

**SURETY**—Payment of composition by—Jurisdiction of Court - - - 772
*See* Bankruptcy Jurisdiction. 2.

**SURVIVOR**—Shares registered in two names—Liability - - - - 585
*See* Joint and Several Liability. 2.

**SURVIVORSHIP**—*Will—Words—Benefit of Survivorship*—"*Survivors*," *when read* "*Others*."] A testator directed the income of the residue of his estate to be divided between all his sons as tenants in common, with benefit of survivorship between them, in case any or either of them should die without issue, and in case any child or children who should be entitled under the trusts of his will to any principal money, or income, should die leaving issue, the principal money, or share, from which the interest of such child or children should be derived, should go to and be divided amongst such issue as tenants in common.—The testator left five sons, two of whom died leaving issue, and three died without issue, the last survivor of the five dying without issue:—*Held*, that on the death of the last surviving son the principal set free accrued to the children of the sons who had died leaving issue. Cross *v.* Maltby 378

**TAKING OFF THE FILE**—*Patent—Disclaimer—Jurisdiction.*] Where a disclaimer had been filed without the consent of the patentee:—*Held*, that the Master of the Rolls had jurisdiction without bill filed to order it to be taken off the file:—Observations on *In re Sharp's Patent* (3 Beav. 245). *In re* Berdan's Patent - - - - 346

**TAXATION OF COSTS**—*Practice—Chancery or Parliamentary Scale—Tramways Act*, 1870 (33 & 34 *Vict. c.* 78)—*Provisional Order of Board of Trade.*] The costs of applications to the Board of Trade for provisional orders under the *Tramways Act*, 1870, are to be taxed on the Chancery and not on the Parliamentary scale. *In re* Morley - - - - - - - 17

2. —— *Practice—Lower Scale—Gen. Ord.* 30*th Jan.* 1857, *r.* 3—*Suit to enforce Charge.*] The costs of a suit by a legatee to enforce against the testator's real estate in the hands of a purchaser his legacy charged by the will on such real estate, are taxable on the lower scale under Rule 3 of the Order of the 30th of January, 1857, when the amount of such charge is less than £1000. Paddon *v.* Wynch - - - - - - 449

3. —— *Practice—Third Counsel.*] An arrangement by which a Q.C. retained for one of the Defendants for the hearing of an appeal has been transferred to the co-Defendants to argue the case

**TAXATION OF COSTS**—*continued.*
for them as leading counsel, does not justify the allowance of three counsel on party and party taxation; although only four counsel were employed between the two sets of Defendants, and the hearing of the appeal occupied several days. Merchant Banking Company *v.* Maud - 452

4. —— *Practice—Patent Suit—Bill dismissed by Plaintiff before Hearing—Costs—Scientific Witnesses—Model*—15 & 16 *Vict. c.* 83, *s.* 43.] In a suit to restrain the infringement of a patent, the Plaintiff, shortly before the hearing, obtained the common order to dismiss the bill with costs.—Amongst the items in the Defendant's bill of costs were charges for drawing particulars of breaches, and having the same settled by counsel, which the Taxing Master had allowed; charges for remuneration of scientific witnesses, which the Master had reduced; and a charge for the construction of a model, which the Master had also reduced. Upon summons by Plaintiffs to review taxation:—*Held*, that the 43rd section of the *Patent Law Amendment Act*, 1852, had no application to the case of a Plaintiff dismissing his own bill before the hearing; that the allowance of remuneration to scientific witnesses was part of the ordinary practice; and that the expense of having a model made might also be allowed.—Observations on the powers and duties of Taxing Masters of Courts of Equity. Batley *v.* Kynock [632

5. —— *Practice—Third Counsel—Skilled Witness—Allowance.*] The junior counsel who had advised throughout the proceedings taken by a claimant against a company in liquidation, in respect of their breach of contract to purchase his business, having been called within the Bar before the hearing of the claim and after a leader had been retained:—*Held*, on review of taxation, that, having regard to the length and complication of the case and evidence, the costs of a third counsel as junior counsel at the hearing ought to be allowed.—An accountant employed as a skilled witness to give evidence in support of the claim, though entitled to a reasonable allowance for his time and expenses in preparing his evidence by an examination of the books, is not entitled upon party and party taxation to his charges for balancing and putting the books into shape for the purpose of supporting the claim. *In re* Charles Laffitte & Co., Limited. Laffitte's Claim 650

**TEMPORARY NUISANCE**—*Nuisance—Injunction—Improper User of Public Street—Suit by Reversioner—Right to sue.*] Where a public street was improperly used as a stable-yard:—*Held*, that the nuisance to the neighbouring houses was not so permanent as to entitle a reversioner to an injunction. Mott *v.* Shoolbred - - 22

2. —— *Injunction—Weekly Tenant.*] The owner or lessee of houses let or sub-let to weekly tenants cannot maintain a suit to restrain a temporary nuisance, such as the noise of machinery in adjacent premises, but—*Semble*, such a suit could be maintained by a weekly tenant if the nuisance were of such a nature as to be injurious to his health or comfort. Jones *v.* Chappell 539

**TENANT FOR LIFE**—Absence for seven years—Presumption of death - - 136
*See* Presumption of Death.

**TENANT FOR LIFE**—*continued.*
—— Apportionment - - - 456
*See* Apportionment.
—— Possession or receipt of rents—Settled Estates Act - - - - - 297
*See* Settled Estates Act.
—— Vacant benefice—Trust for sale - 317
*See* Advowson.
**TENANT IN COMMON**—Waste—Coal mine 84
*See* Waste. 1.
**TENANT IN TAIL**—Money in Court—Payment without disentailing deed - 372
*See* Payment out of Court.
—— Statute of Limitations - - 692
*See* Limitations, Statute of. 1.
**TESTAMENTARY EXPENSES**—Costs in administration suit - - - 471
*See* Costs in Administration Suit.
**THEATRE**—Underlease of boxes and stalls—Use for other than theatrical purposes 145
*See* Box at Theatre.
**THIRD COUNSEL**—Costs of—Taxation 452, 650
*See* Taxation of Costs. 3, 5.
**TIME**—Appeal in bankruptcy - - 143
*See* Bankruptcy Appeal.
—— New trial in bankruptcy - - 763
*See* New Trial in Bankruptcy.
—— Setting aside award - - - 39
*See* Submission to Arbitration.
—— Three days' notice—Sunday - - 289
*See* Contempt of Court.
**TITLE**—Misleading conditions of sale - 50
*See* Conditions of Sale.
**TITLE-DEEDS**—Delivery up—Foreclosure—Mortgagee - - - - - 238
*See* Purchase for Value without Notice.
**TRESPASS**—Tenant in common—Working coal mine - - - - - - 84
*See* Waste. 1.
**TRUST**—Breach of—Married woman—Liability of separate estate - - - 321
*See* Separate Estate of Wife.
—— Charitable—Trust for parish - - 483
*See* Trust for Parish.
—— Express—Statute of Limitations - 721
*See* Limitations, Statute of. 2.
—— Sale of advowson—Right to present - 307
*See* Advowson.
**TRUST FOR PARISH**—*Charitable Trust.*] A trust of property in favour of a parish or the parishioners of a parish for ever can only be upheld on the ground of its being a charitable trust.—In 1585 property was conveyed to two persons upon a secret trust for a *London* parish. The income of the property was afterwards received by the churchwardens and applied to charitable purposes:—*Held*, that the property was subject to a charitable trust. Attorney-General *v.* Webster - - - - - - 483
**TRUSTEE**—Costs—Payment into Court with reason - - - - - 561
*See* Trustees Relief Act.
—— Power of sale—Charge of debts - 348
*See* Charge of Debts.
**TRUSTEE**—*continued.*
—— Unborn person—Trustee Act, 1850 - 182
*See* Partition Suit. 2.
**TRUSTEE IN BANKRUPTCY**—Disclaimer 682
*See* Disclaimer.
**TRUSTEE ACT**—Sale under Partition Act 20
*See* Partition Suit. 1.
**TRUSTEES RELIEF ACT**—*Payment into Court—Costs.*] The trustees of a trust fund to which their *cestui que trust* has become entitled in default of appointment by a tenant for life, are justified in paying it over to him on being informed in writing by the solicitor to the parties that he has reason to believe that no appointment has been made; and would be free from liability in doing so.—Trustees who under such circumstances pay the trust fund into Court under the *Trustees Relief Act* will not, as a rule, be entitled to their costs. *In re Wylly's Trusts* (28 Beav. 458) explained. *In re* Cull's Trusts - - 561
**ULTRÀ VIRES**—Directors of company - 225
*See* Director's Liability.
—— Suit to restrain act of directors 383, 474
*See* Suit by Shareholder. 1, 2.
**UNBORN ISSUE**—Partition suit—Form of order for sale - - - - - 20
*See* Partition Suit. 1.
**UNCERTAIN AGREEMENT**—*Vendor and Purchaser—Specific Performance—Reservation of "Necessary Land for making Railway"—Defence not raised by Demurrer—Costs.*] Contract for the sale of an estate, vendor reserving "the necessary land for making a railway" through the estate to *P.* In a suit by the purchaser for specific performance:—*Held*, that the reservation was void for uncertainty, and that the contract could not be enforced:—*Held*, also, that, though the defence was raised by answer and not by demurrer, the bill must be dismissed with costs. Pearce *v.* Watts - - - - - - 492
**UNDERLEASE**—Disclaimer of lease by trustee in bankruptcy - - - - 682
*See* Disclaimer.
**UNDERWRITING BUSINESS**—Agreement to share profits - - - - 331
*See* Perception of Partnership Profits.
**UNDISCHARGED DEBTOR**—*Second Liquidation Petition before Discharge under First—Rights of Creditors under First Petition—Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *ss.* 54, 125—*Bankruptcy Rules*, 1870, *rr.* 183–185, 256. A debtor filed a liquidation petition, and his creditors resolved on a liquidation. All his property was realized by the trustee, and dividends amounting to less than 10*s.* in the pound were paid to the creditors. They then resolved to close the liquidation and to release the trustee, but they did not grant the debtor a discharge. He contracted fresh debts, and more than three years afterwards he filed a second liquidation petition.—The creditors met and resolved on a liquidation, but the Registrar refused to register the resolutions because no notice of the meeting had been given to the creditors under the first petition:—*Held*, that no such notice was necessary, and that the resolutions ought to be registered.—The creditors under the

**UNDISCHARGED DEBTOR**—*continued.*
first petition had no rights against the debtor's property except under the provisions of sect. 54 of the *Bankruptcy Act*, 1869. *Ex parte* Williams. *In re* Williams - - - - - 743

**UNDUE ADVANTAGE** — Creditors—Liquidating debtor - - - - 65
*See* Fraudulent Preference. 1.

**USER**—Patent—Injunction - - - 37
*See* Patent Suit.

—— Street nuisance—Improper use of street 22
*See* Temporary Nuisance. 1.

—— Theatre—Other than theatrical purposes 145
*See* Box at Theatre.

**VALUATION**—Assets of liquidating debtor 291
*See* Receiver. 2.

—— Order to permit valuer to enter - 511
*See* Mandatory Order.

—— Security - - - - - 273
*See* Creditor holding Security.

**VENDOR AND PURCHASER**—Conditions of sale [50
*See* Conditions of Sale.

—— Order to permit valuation to be made 511
*See* Mandatory Order.

—— Reservation of necessary land - 492
*See* Uncertain Agreement.

—— Restraint on alienation out of the family 186
*See* Restraint on Alienation.

—— Statute of Frauds—Description of contracting parties - - - - 11
*See* Frauds, Statute of.

—— Title—Charge of debts - - - 348
*See* Charge of Debts.

**VESTING**—Death in life of tenant for life 711
*See* Death coupled with a Contingency. 2.

**VOLUNTARY SETTLEMENT**—27 *Eliz. c.* 4—*Consideration—Covenant to commence building a House—Aged Vendor.*] A deed conveying the whole of the real estate of the grantor, and otherwise voluntary, contained a covenant by the grantee under certain specified circumstances to build a house on part of the estate conveyed within a limited period, but there was no shifting clause or provision for defeasance in case of non-performance of the covenant:—*Held*, that the covenant raised no consideration affecting the voluntary nature of the contract, and specific performance decreed of a contract (subsequent to the settlement) made by the settlor for sale of part of the estate. Rosher *v.* Williams - - 210

**WAIVER**—Irregularity—Notice of motion 733
*See* Bankruptcy Jurisdiction. 1.

**WARD OF COURT**—Rectification of settlement [666
*See* Rectification of Settlement. 1.

**WASTE**—*Coal Mine—Tenants in Common—Licence by two only out of three Co-tenants—Rights of third Co-tenant—Acquiescence—Costs.*] It is not destructive waste for a tenant in common of a coal mine to get, or to license another to get, the coals, he, the working tenant, not appropriating to himself more than his share of the proceeds.—The Plaintiff, a tenant in common of a

**WASTE**—*continued.*
coal mine, had notice of a negotiation, which was followed by a lease for three years (in which he did not join) by his two co-tenants, dated in December, 1865, of two undivided thirds of the coal with license to work the coal. Under this license some coal, but considerably less than two-thirds of the whole, was raised, and one-third of the royalty was kept by the licensee for the Plaintiff. A negotiation for a further license was on foot, when in October, 1872, the Plaintiff filed the bill against his co-tenants and the licensee, praying for an inquiry as to the value of the coals raised: and an account against all the Defendants as trespassers; for an injunction and receiver; and for damages:—*Held*, that the working was not a trespass; and the Plaintiff electing to dismiss the bill with costs against his co-tenants, decree, without costs, against the licensee for an account of the value at the pit's mouth of the coal raised, less costs of getting and raising, and for payment of one-third to Plaintiff. Job *v.* Potton - - - - - 84

2. —— *Lessor and Lessee—Railway.*] The lessee of land who erects a building thereon without the consent of his lessor does not commit waste within the definition in *Co. Lit.* 53a unless it can be shewn that such building is an injury to the inheritance. Jones *v.* Chappell [539

**WEEKLY TENANT**—Nuisance—Injunction 589
*See* Temporary Nuisance. 2.

**WIFE'S CHOSE IN ACTION**—*Husband and Wife—Legacy to Wife not reduced into Possession—Desertion—Protection Order*—20 & 21 *Vict. c.* 85, *ss.* 21, 25—*Vendor and Purchaser Act*, 1874 (37 & 38 *Vict. c.* 78), *s.* 9—*Costs.*] Where a married woman, entitled to a legacy charged on real estate which had not been reduced into possession by her husband, obtained a protection order, in consequence of her husband's desertion, under 20 & 21 Vict. c. 85, s. 21:—*Held*, that the legacy, on being paid to her after the date of the order, was property which then came to or devolved upon her within sects. 21 and 25 of the Act, and that her receipt was a good discharge:—*Held*, also (the question being raised by summons under the *Vendor and Purchaser Act*, 1874, s. 9, in respect to the title to the estate charged), that the declaration ought to be made without costs. Form of order. *In re* Coward and Adam's Purchase - - - - - - 179

2. —— *Practice—Divorce and Matrimonial Causes Act*, 1857 (20 & 21 *Vict. c.* 85), *ss.* 21, 25, 26—*Married Woman having obtained Protection Order—Suit by—Further Consideration—Evidence—Continuing Separation—No Settlement.*] Where, upon the further consideration of an administration suit instituted by a married woman who had obtained a protection order suing as a *feme sole* by virtue of the provisions of the Act 20 & 21 Vict. c. 85, ss. 21, 25, 26, it was proposed to pay to the married woman her share of the testator's estate, the Court:—*Held*, that evidence must be produced that the separation was a continuing one, but accepted the affidavit of the married woman as to this fact, and also as to no settlement or agreement for a settlement having been made. Ewart *v.* Chubb - - 454

**WILL**—Accumulations - - - 255
*See* Accumulations.
—— Advowson—Right to nominate - 317
*See* Advowson.
—— Annuity—Corpus or income - - 269
*See* Annuity charged on Corpus.
—— Appointment under two special powers 599
*See* Appointment under Special Powers.
—— Bequest of stock - - - 304
*See* Legacy, Specific or General.
—— Charge of debts if personalty insufficient
*See* Charge of Debts. [348
—— Condition not to sell out of the family 186
*See* Restraint on Alienation.
—— "Death without issue" - - 220
*See* Death coupled with a Contingency. 1.
—— Devise of legal estate - - - 166
*See* Devise of Legal Estate.
—— Distribution among relatives "as the law directs" - - - - 410
*See* Distributions, Statute of.
—— Gift of income to two for their lives - 342
*See* Gift to Two for their Lives.
—— Gift to a class—Brothers and sisters - 647
*See* Gift on attaining Twenty-one.
—— Legacy—Tenant for life and remainderman
*See* Apportionment. [456
—— Revocation of gift—Alteration of gift—Will before 1838 - - - - 428
*See* Revocation of Gift.
—— "Survivors" when read "others" - 378
*See* Survivorship.
—— Testamentary expenses—Costs in action—Suit - - - - - 471
*See* Costs in Administration Suit.
**WINDING-UP**—Appeal - - - 639
*See* Appeal in Winding-up.
—— Agreement with promoter — Indemnity against costs - - - 620
*See* Agreement to indemnify.
—— Director—Profit by—Paid-up shares 580
*See* Fiduciary Relation.
—— Director—Qualification - - 506
*See* Director's Qualification.
—— Distribution of surplus assets - - 59
*See* Distribution of Surplus Assets.
—— Injunction - - - - 325
*See* Injunction in Winding-up.
—— Interest on calls - - - 360
*See* Liquidator.
—— Leave to issue execution - - 162
*See* Leave to proceed after Winding-up.
—— Liquidator—Appointment of - - 360
*See* Liquidator.
**WINDING-UP**—*continued.*
—— Paid-up shares—Contract for - 524
*See* Contract for paid-up Shares.
—— Petition for - - - 268, 337
*See* Winding-up Petition. 1, 2.

**WINDING-UP PETITION**—*Judgment Creditor—Issue of Execution—Companies Act*, 1862, *s.* 80, *sub-s.* 2.] Where a judgment creditor is told by the solicitors of the company indebted to him that they have no assets on which he can levy, that is such evidence of their inability to pay their debts as relieves him from the necessity of issuing execution in order to bring himself within the *Companies Act*, 1862, s. 80, sub-s. 2. *In re* Flagstaff Silver Mining Company of Utah - - - - - - 268

2. —— *Company—Inability to pay Debts—Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *s.* 80, *sub-ss.* 1, 4.] A company bought goods, giving in part payment its acceptance, which was dishonoured on presentation, and continued unpaid: and the vendor presented a petition for winding up the company:—*Held*, that the dishonour of the bill was proof to the satisfaction of the Court, under sect. 80, sub-sect. 4, of the *Companies Act*, 1862, that the company was unable to pay its debts, although the Petitioner had not served a demand requiring payment under sub-sect. 1. *In re* Globe New Patent Iron and Steel Company - - - - - - 337

**WITNESS**—Skilled—Costs - - 632, 650
*See* Taxation of Costs. 4, 5.

**WORDS**—"As the law directs" - - 410
*See* Distributions, Statute of.
—— "At their death" - - - 342
*See* Gift to Two for their Lives.
—— "Die leaving issue" - - - 220
*See* Death coupled with a Contingency. 1.
—— "Die without issue" - - - 220
*See* Death coupled with a Contingency. 1.
—— "Necessary for purposes aforesaid" - 544
*See* Nuisance by Railway Company.
—— "Necessary land for making railway" 492
*See* Uncertain Agreement.
—— "Out of the family" - - - 186
*See* Restraint on Alienation.
—— "Parishioner" - - - - 606
*See* Election to Christ's Hospital.
—— "Possession on receipt of rent" - 297
*See* Settled Estates Act.
—— "Survivors" - - - - 378
*See* Survivorship.
—— "Unborn person" - - - 182
*See* Partition Suit. 2.
**WRIT**—Prohibition—Lord Mayor's Court 1, 552
*See* Prohibition. 1, 2.

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